In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-434

WILLIAM FRED PHILLIPS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William Fred Phillips, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 29, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is sought to be reviewed, and which has not been reported as of this date, is printed in Appendix A hereto, *infra*,

at page A1. The prior Findings and Opinion of the United States District Court for the Western District of Missouri, Western Division, is also printed in Appendix A at page A22, and is unreported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, page A1) was entered on June 29, 1976. A timely petition for rehearing was denied on July 26, 1976 (Appendix A, page A43). An order staying issuance of the mandate pending the filing of a petition for certiorari was entered by the Court of Appeals on August 6, 1976 (Appendix A, page A44). Mr. Justice Harry A. Blackmun entered an order on August 20, 1976, extending the time for the filing of this petition to and including September 24, 1976. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals in vacating the petitioner's judgment of conviction for making a false declaration before a grand jury in violation of 18 U.S.C. Sec. 1623 should have remanded this case for a new trial on all of the issues instead of a hearing on the sole question of whether a surreptitiously taken tape recording, taken by persons not acting under color of law, was made for the purpose of committing a criminal, tortious or other injurious act so as to prohibit its admission into evidence under 18 U.S.C. Secs. 2511(2)(d) and 2515 of the Federal Wire Interception and Interception of Oral Communications Act?

2. Whether the ultimate burden of alleging and proving the specific criminal, tortious, or other injurious purpose for which an oral interception is made, as defined and prohibited by the Federal Wire Interception and Interception of Oral Communications Act, 18 U.S.C. Secs. 2510 (2) (4) (5), and 2511(2)(d) must be carried by a defendant?

3 Whether the remanding of this case for such specific purpose only deprives the petitioner of his right to have such issues determined by a jury?

4. Whether this prosecution should have been dismissed because of the failure of the government to prove that the interception of the oral communication herein did not fall within the subexceptions provided by 18 U.S.C. Sec. 2511(2)(d), and its successful opposition to the petitioner's efforts to establish the inadmissibility of the interception by reason of said subexceptions?

5. Whether the tort of invasion of the right of privacy is a tortious or other injurious act within the meaning of 18 U.S.C. Sec. 2511(2)(d)?

6. Whether the petitioner's alleged false declarations were relevant to the special grand jury's investigation so as tc tend to impede, influence or dissuade it from pursuing such investigation, thereby conferring jurisdiction upon it to return the indictment herein?

7. Whether the government's questions and petitioner's answers thereto, upon which the indictment is based, were so broad and ambiguous so as to fall within the proscription of *Bronston* v. *United States*, 409 U.S. 352 (1973)?

STATUTES INVOLVED

18 U.S.C. Sec. 1623.
18 U.S.C. Sec. 2510(2).
18 U.S.C. Sec. 2510(4).
18 U.S.C. Sec. 2510(5).
18 U.S.C. Sec. 2510(11).
18 U.S.C. Sec. 2511(1) (a).
18 U.S.C. Sec. 2511(b).
18 U.S.C. Sec. 2511(b) (iii).
18 U.S.C. Sec. 2511(c).
18 U.S.C. Sec. 2511(1) (d).
18 U.S.C. Sec. 2511(2) (d).
18 U.S.C. Sec. 2515.
18 U.S.C. Sec. 3504(a) (1).

See Appendix B, *infra*, for pertinent texts of the above statutory provisions.

STATEMENT OF CASE

Preliminary Statement

An indictment was handed down by a special grand jury sitting in the Western District of Missouri, Western Division, on February 8, 1973, charging petitioner with two counts of making false declarations before a grand jury on August 1, 1972, in violation of 18 U.S.C. Sec. 1623. [Appendix C, *infra*, p. A49] The case was originally assigned to Chief Judge William H. Becker, who in turn transferred the case to Judge Richard M. Duncan, Senior Judge. Judge Duncan ruled on all pretrial motions and presided throughout the trial. He died on July 31, 1974,

before ruling on petitioner's motion for judgment of acquittal, and before the filing of his motion for a new trial. The case was then assigned to Judge Elmo B. Hunter, who filed a certificate pursuant to Rule 25, Federal Rules of Civil Procedure, certifying that he could properly rule on all pending matters. Judge Hunter denied the petitioner's motions for acquittal and a new trial on April 10, 1975. A sentence of one year imprisonment was imposed on May 16, 1975.

On appeal, the petitioner charged numerous points of error, including jurisdiction of the grand jury to hand down the indictment, error in denying repeated motions to suppress a secretly taken tape recording, violation of the Federal Wire Interception and Interception of Oral Communications Act, which would preclude the use of the tape in this case, abuse of the grand jury process by the manner of questioning of petitioner, lack of evidence to sustain the verdict, and other matters not being pursued herein.

Pretrial Proceedings

The following motions or orders were part of the pretrial proceedings:

1. Motion to Suppress Tape Recording which raised questions relating to the probative value of the tape, its trustworthiness, jurisdiction of the special grand jury, violation of the petitioner's constitutional rights, and abuse of the grand jury's power. The motion was denied.

2. Supplemental Motion to Suppress which suggested the applicability of the Federal Wire Interception and Interception of Oral Communications Act. The motion was denied.

3. Motion for a Bill of Particulars. It was also denied.

4. Motion to dismiss which raised questions relating to the sufficiency of the indictment, the exceeding of its power by the special grand jury in that it was not functioning as a competent tribunal, entrapment, and jurisdiction. It was denied.

5. Motion for Discovery and Inspection. It was sustained in part in that the court ordered that a copy of the tape recording be furnished to the petitioner.

6. Motion for Disclosure which sought the identity of the person who delivered the tape to the government, and the person who revealed the existence of the tape recording to any representative of the government. Because of what appeared to be acquiescence by the government, the court ordered that the government supply the petitioner the name and address of the person who supplied the tape recording to the government (Overton), and the person who told the government such tape recording was in the possession of the person who supplied it (Davis).

The Evidence

The case went to trial on July 10, 1974. The government later dismissed Count I of the indictment. The jury found the petitioner guilty on Count II on July 12, 1974.

It is noted that the petitioner is an attorney, a former assistant district attorney, a former judge, and a former Oklahoma state senator.

Stripped of peripheral immaterial matters, the government's proof was simple—comparing a transcript of the petitioner's testimony before a special grand jury on August 1, 1972, and a tape recording of a conference between the petitioner, Charles Davis and George L. Overton, taken without the petitioner's knowledge on July 7, 1971.

Government counsel read portions of the grand jury transcript to the jury which included the questions and answers upon which Count II of the indictment is bottomed. Count II contains eight questions in all, some of which are statements, rather than questions, and some of which were not answered. [See Appendix C, pp. A49-A52]

The circumstances leading up to the conference were furnished by J. Duke Logan, a Vinita, Oklahoma, lawyer, who was the attorney for the Grand River Dam Authority. The Authority, an Oklahoma state agency, operates the Pensacola Dam, reservoirs, and other bodies of water for the production of hydropower and the sale of electricity. He knew George Overton, manager of the Shangri-la Lodge, which was located on a peninsula extending into Grand Lake in Delaware County, Oklahoma. On June 25, 1971, he had a conversation with Overton, and as a result of that conversation, made a phone call to the petitioner. Logan related to him that Charles Davis, the owner of Shangri-la Lodge, wanted to build a small dam which would cut off one of the small coves on Grand Lake. Davis was contemplating building an extensive condominium project, and to make the project more attractive, desired to build the dam so as to raise the water level of the cove. Petitioner was advised that approval would have to be obtained from the Federal Power Commission and the Corps of Engineers. The petitioner was asked to represent Davis before the Grand River Dam Authority. It was known to Logan that the petitioner was very close to the governor of Oklahoma, and the then new administration, and for that reason he felt that petitioner was the logical person to represent Davis before the Authority. On July 1, 1971, Logan had a conference with Davis and Overton, at which time he explained the complex bureaucratic procedures required to obtain government approval. On July 6, 1971, Logan met with the petitioner. At this

meeting it was explained to the petitioner that he would represent Davis before the Grand River Dam Authority, and when it approved the project, it would then be possible for Logan to make the application to the appropriate federal agencies. It was critical to Davis that the approval be quickly obtained. A fee of ten thousand dollars was mentioned by petitioner. At that time Logan called Overton and set up a meeting for the following day, July 7, 1971, at 2:00 P.M. at the Shangri-la. It later developed that the fee arrangement covered a number of services to be rendered by petitioner, including several trips to Washington, D. C., meeting with a number of state officials and state agencies, and representing Davis on such matters as collections and defending him or his employees in the event his club was raided because of illegal liquor operations. It was undisputed that the Grand River Dam project involved a complex series of beaureaucratic applications and presentations, and that the petitioner was instrumental in obtaining such approval. It was further established that the Davis business was not solicited by the petitioner.

Overton described the ambitious size and character of the Shangri-la project, and the fact that its club sold whisky by the drink in violation of Oklahoma law. (Such club sales appear to be common practice and a fact of life in Oklahoma.) He admitted that the July 7 conference was taped by a tape recorder with a hidden microphone. The taping, which was deliberately accomplished without the petitioner's knowledge, was done by a private detective named J. R. Gates who, with his electronic equipment, was flown from Wichita, Kansas, to Afton, Oklahoma, in Davis' private plane. The detective, not acting under color of law, placed a tiny microphone about the size of a dime under a coffee table in the conference room, and installed the tape recorder in another room. The tape was turned

over to a government agent on July 8, 1972. It was in turn given to a Strike Force attorney on July 10, 1972. The petitioner was subpoenaed to appear before a special grand jury sitting in Kansas City, Missouri, on August 1, 1972. The indictment followed a little over six months later.

The detective took the Fifth Amendment whenever questions pertaining to electronic surveillance were asked, and when he was queried as to whether he knew Davis, Overton, or the petitioner. He refused to answer questions relating to being retained by Davis, whether he crossed a state line to do the job, the hour he started taking the recording, whether he had taken such a recording, whether any parts of the conversation were missing, whether he had started the tape at the beginning of the July 7, 1971, conference, and whether he had edited the tape.

The petitioner was serving in the Oklahoma State Senate when the legislature apportioned the state in 1970, at which time a part of Delaware County, in which Davis' project was located, was added to his district.

The dam project was of a technical nature, and the petitioner had had extensive engineering experience. He was not advised in advance of the precise nature of the July 7 conference, but expected it to cover the engineering and federal and state agency aspects of the project. He was not aware that a "bug" had been planted in the room. The petitioner did not remember the details of the conversation, but he did recall, after hearing the tape, that Mr. Overton kept returning to the operation of a club at the Shangri-la. A statement, "I can, I can control Frank" which is probably the only basis for the conviction, was explained by the petitioner within the context of the entire conversation, at least, that which had been re-

corded. He stated that he meant that he would talk to Grayson and present any problems he had with the Grand River Dam Authority or the Shangri-la construction. He pointed out that lawyers often work out problems in this manner. The conversation relating to slot machines and the like had nothing to do with being retained for Grand River Dam Authority work or the fee. He had given advice about the fee *prior* to the meeting. He had no way of knowing that Overton would keep bringing up club problems (whisky sold across the bar).

The record is replete with the details of the work done by the petitioner for and on behalf of Mr. Davis, all on the original fee arrangement which was paid on a monthly basis over an extended period of time.[1] There is no question that he had no knowledge of the tape recording when it was taken or when he appeared before the grand jury on August 1, 1972. The Strike Force attorneys who questioned him before the grand jury did not advise him that they had a tape in their possession. In fact, the petitioner did not know of the tape's existence until after he was indicted on February 8, 1973. In passing, it is noted that he was questioned in tandem by two prosecutors before the grand jury, and there was no effort made to refresh his recollection of the conference which had taken place approximately thirteen months before his appearance.

Davis admitted that the petitioner had certainly assisted him in getting the job done with reference to the dam, and that the project was satisfactorily completed.

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1. Although the government prosecutor constantly referred to the fee arrangement as a "bribe", the evidence did not sustain these assertions. The original trial judge was satisfied that the fee arrangement was a legitimate one and so stated. The successor judge agreed with the trial judge. The Court of Appeals ignored the accusation although repeated in the government's briefs.

The government offered approximately thirty-five transcripts of the grand jury testimony of other witnesses in order to establish the materiality of the questions asked of the petitioner. In no way did any of the witnesses implicate the petitioner in the activities being investigated by the special grand jury, to-wit: connections between Kansas City, Missouri, hoodlums and people in northeast Oklahoma with respect to prostitution, narcotics, liquor, or gambling activities. Nor did any witness suggest that the petitioner could furnish information helpful to the grand jury in this regard.

A motion for judgment of acquittal was made at the conclusion of the government's case and renewed at the conclusion of all the evidence. The court reserved his ruling.

After the jury returned its verdict of guilty, the petitioner was granted thirty days in which to file post-trial motions. Both the petitioner and the government were directed to file briefs.

Post-Trial Proceedings

Judge Duncan died less than three weeks after the jury's verdict was handed down without ruling on the petitioner's motion for acquittal, and before he was able to file his motion for a new trial. The case was then assigned to Judge Elmo B. Hunter for disposition of the motions, and for any and all other appropriate action. Judge Hunter, after filing the certificate required by Rule 25, Federal Rules of Criminal Procedure, denied petitioner's motions for acquittal and for a new trial. We note that the petitioner was never given the opportunity to present oral argument in support of his motions.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, in vacating the petitioner's judgment of conviction and remanding this case to the District Court for the limited purpose of a suppression hearing, with authority to reinstate the verdict if he finds that the tape was not taken for a criminal, tortious, or injurious purpose, has failed to act in accord with Whiteley v. Warden of Wyoming Penitentiary.[2]

The Court of Appeals found that no evidence was proffered during the course of the trial as to *why* Davis and Overton caused the conversation to be recorded. While the court held that the ultimate burden of proving that the conversation was not recorded for any criminal, tortious, or other injurious purpose, rested with the petitioner, it further held that the petitioner was effectively denied a meaningful opportunity to present evidence as to the purpose of the conversation.

The court remanded this case to the district court for a hearing to determine the purpose for which the conversation was recorded. If the recording was found to be made for a legitimate purpose, the judgment of conviction shall be reinstated. If, however, the petitioner proves by a preponderance of the evidence that the recording was made for a criminal, tortious, or other injurious purpose, the tape must be suppressed and a new trial ordered. This procedure was specifically disapproved in *Whiteley*.

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2. 401 U.S. 560 (1971).

The Court of Appeals relied on *United States* v. *Rose*, 526 F.2d 745 (8th Cir. 1975). *Rose* in turn cites two other Eighth Circuit cases: *Turk* v. *United States*, 429 F.2d 1527 (1970), and *United States* v. *Wixon*, 460 F.2d 206 (1972). In *Wixon*, the Court of Appeals for the Eighth Circuit conceded that the Supreme Court had refused to follow such procedures in *Whiteley*.

In *Whiteley*, this Court reversed the Court of Appeals for the Tenth Circuit which had affirmed a district court's denial of a petition for a writ of habeas corpus. The petitioner had complained that his conviction was invalid because of the use of evidence seized during a warrantless search of his automobile without probable cause. The Court refused to remand the case to the state courts of Wyoming for the sole purpose of giving the state an opportunity to develop a record which might show probable cause for the issuance of a warrant by a magistrate. The Court, noting that as here, the illegality of the evidence was brought up at every stage of the proceedings, gave the state the option of trying the entire case, or letting the writ issue.[3] See also *Giordenello* v. *United States*, 357 U.S. 480 (1958). *Rose*, *Turk* and *Wixon* all involved questions of probable cause.

The procedure of remanding for such a limited purpose after a jury trial raises a plethora of vexing questions for which there is at present no authority within the context of the federal act herein involved.

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3. The record will show that as early as February 27, 1973, during an omnibus hearing before a United States magistrate, the petitioner advised that he would file a motion to suppress the recording. The motion was filed, pended for a year, and was denied on June 6, 1974, without a hearing. As the Court of Appeals noted in its opinion, a new motion to suppress was filed the eve of trial, and like the first motion, was summarily denied.

Reaching a determination as to whether probable cause exists is far removed from making a finding as to whether the activities of several persons involved in a surreptitious unilateral consensual tape recording are criminal, tortious, or designed for some injurious purpose. Such activities, which are impermissible under 18 U.S.C. Sec. 2511(2)(d), and criminal under 18 U.S.C. Sec. 2511(1)(a), may raise complex factual issues, and of necessity, a full fabric of circumstances and background in order to arrive at the purpose of the transaction and the often vexing and difficult question of intent—usually a subjective phenomenon.

The petitioner is placed in a dilemma. He may wish to pursue other specifications of error on certiorari which are not related to the limited remand procedure. It would create an incongruity if he were to petition for a writ of certiorari while a portion of the case is still being heard in the district court. On the other hand, if he did not petition for certiorari, he would, if he appeals from an order reinstating the judgment of conviction, be confined in the Court of Appeals to the new questions raised by the suppression hearing, thus engendering serious doubt as to whether he had preserved his other claims of error. Further pursuing the pressing questions raised by the lower court's order, if the Court of Appeals' judgment is not final until the lower court rules, will petitioner have to take certiorari from that ruling, thereby bypassing the Court of Appeals, which appears to be impermissible, or should he reargue in that court all of his points in order to preserve them? Or would he have to apply for a writ of certiorari on part of the case at the present time and appeal to the Court of Appeals from new issues raised by the suppression hearing, including the procedure?

The frequently stated objective of Chief Justice Burger relating to the saving of judicial time would not be served

by the multiple appeals which appear imminent in this case if the Court of Appeals is permitted to remand for a suppression hearing only. It is vital that this question be settled by the Court.

II.

The Court should decide as a case of first impression whether the government is required to prove as a matter of foundation for the admission of critical evidence that an interception was made for no criminal, tortious, or other injurious purpose, or whether the party against whom such evidence is offered be required to carry the ultimate burden of proving that an interception was made for a specific criminal, tortious or other injurious purpose.

The allocation of the burden of proof under the consensual provisions and the subexceptions contained in the Federal Wire Interception and Interception of Oral Communications Act, 18 U.S.C. Sec. 2511(2)(d), is a matter of first impression. Is the government required to prove as part of its case that an interception, not taken under color of law by a person who is a party to the interception, or has given his consent thereto, *was not* taken for a criminal, tortious, or other injurious purpose? Or, is the ultimate burden of proving that such an interception *was* taken for one or more of such purposes placed on a defendant?

The Court of Appeals places such burden squarely on a defendant.

The Court of Appeals held that "Available legislative history" reflected no congressional desire to change the traditional burden of proof so that "existing law" applied to electronically gathered evidence, and that it perceived

sound reasons for preserving the traditional allocation of burden of proof within the context of 18 U.S.C. Sec. 2511(2)(d). It then gave as its chief reason, outside of the meager legislative history of the aforesaid provision, its concern that to require the government to prove as a matter of foundation that an interception was made for *no* criminal, tortious or injurious purpose, would create an impossible burden of proving three negatives. It asserted that logic requires that the party against whom the evidence was offered should carry the ultimate burden.[4] Such cases as *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *United States* v. *Harpel*, 493 F.2d 346 (10th Cir. 1974), were distinguished, while *In re Winship*, 397 U.S. 358, 364 (1970) and *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958), cited by petitioner, were ignored.[5] The burden may at times be a difficult one, but as Justice Powell stated in the majority opinion in *Mullaney*:

> ". . . Nor is the requirement of proving a negative unique in our system of criminal jurisprudence. . . . Satisfying this burden imposes an obligation that, in all practical effect, is identical to the burden involved in negating the heat of passion on sudden provocation. Thus, we discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability." 421 U.S. at 702.

4. The Court of Appeals was obviously concerned about the question, and directed the parties to file supplemental briefs treating allocation and burden of proof.

5. See *United States* v. *Blatell*, 340 F.Supp. 1140 (N.D. Iowa 1972), where a prosecution under Sec. 2511(1)(a) of the act here in question was dismissed because the government failed to prove that Northwestern Bell Telephone Company was a common carrier. Accord: *United States* v. *Burroughs*, 379 F.Supp. 736 (D. S.C. 1974). (Failure to prove wire communication was used in interstate commerce.)

In the case at bar, the Court of Appeals has not taken cognizance of the realities of the situation. Circuit Judge Ross commented during oral argument that he could not see how the petitioner could carry any burden of proof with respect to the legality of the tape since he did not even know of its existence until much later.[6] It would appear that if the law is as held by the Court of Appeals, an impossible burden is actually placed on the petitioner. All the government had to do here was call the persons responsible for the interception and ask them why they did it. It doesn't make sense to permit the government to merely identify the tape and the voices thereon, and then require the petitioner, with no resources at his command, confronted by men who would most certainly not harbor any altruistic motives toward him, and who did not know of the tape's existence until a year and a half later, to explore the purposes which prompted the other participants to make the recording. The practical necessities are far different than those in the ordinary probable cause situation.

The Court of Appeals has also complicated the question of proof by further holding that its disposition of the case does not relieve the government of its obligation under 18 U.S.C. Sec. 3504(a)(1) to affirm or deny the occurrence of the claimed unlawful act. On remand, it directed that the trial judge should require the government to call the parties responsible for the interception and to establish a legal purpose for the interception. (Appendix A, page A9)

What is the burden to be carried by the prosecution? Does it have to prove legality beyond a reasonable doubt? If so, then it would appear that the prosecution has the

6. The existence of the tape was not made known to the petitioner until *after* he was indicted on February 8, 1973. The tape was taken on July 7, 1971.

same burden it should have been compelled to carry at the trial: proving the legality of the tape recording as a part of its case. The procedure ordered by the Court of Appeals is extremely confusing and time consuming which, we submit, requires this Court to decide the allocation of the burden of proof in cases involving 18 U.S.C. Sec. 2511(2)(d).

Finally, because of the unusual and extremely broad provisions of the subexceptions contained in 18 U.S.C. Sec. 2511(2)(d), if the burden of proof falls upon a defendant to prove a criminal act, for example, he would in effect become a prosecutor.

III.

The remanding of this case for such a specific purpose deprives the petitioner of his right to have such issues determined by a jury.

The question presented here is of fundamental importance. If the unique subexceptions contained in Sec. 2511(2)(d) place the burden of establishing the foundation for the receiving into evidence of intercepts of oral communications, and such evidence is a critical part of the government's case, as here, is it not a part of the entire case to be proved beyond a reasonable doubt? We suggest it is, and should be promptly settled by the Court.[7] If so settled as the petitioner suggests, he would then be entitled to a trial by jury of the issue of the criminal

7. It is not arguably defensible that the government may not be required to negative activities prohibited by Sec. 2511(2)(d) when such activities, when not so negatived, may be criminal in nature subjecting the perpetrators to possible criminal prosecution, fines up to $10,000.00, and imprisonment for up to five years. 18 U.S.C. Sec. 2511(a). The Court of Appeals noted that it was not deciding on whom the burden rests when a defendant is prosecuted under Sec. 2511(1)(a) and the subexceptions contained in Sec. 2511(2)(d). (Appendix A, p. A9)

or tortious nature of the evidence offered by the government which would then bear upon its admissibility for consideration by the jury. This is particularly critical in cases such as this when no reliance is placed upon the memory of witnesses, the case being presented by merely identifying the tape and voices thereon, and comparing it with a defendant's prior sworn testimony.

IV.

The Court should decide whether a prosecution should be dismissed when the government fails to prove that an interception of an oral communication was legally taken, and not within the subexceptions provided by 18 U.S.C. Sec. 2511(2)(d), when the government relies solely on the exception in said statute to establish its case.

We shall be brief. The government made no effort to establish why the conversation was recorded. In view of the aforesaid subexceptions, this was fatal to its case. Without the tape, there could be no comparison with the petitioner's grand jury testimony. The government chose to present its case in this fashion, and is thus bound by such strategy.

Furthermore, the government conceded its obligation. The following colloquy took place on the morning the trial began, and after the petitioner's second motion to suppress was denied without a hearing.

> "THE COURT: Gentlemen, just a moment, while we are on that subject. *The government would have to show that the tape was taken under certain circumstances and make it admissible. Any question on that?*
>
> "MR. CORNWELL: *No, sir. As to foundation, that is true.*" (Emphasis supplied)

Finally, the petitioner tried to establish tortious and injurious conduct on the part of Overton and Davis. However, the government not only convinced the court that tortious or injurious conduct was irrelevant, but it effectively blocked all efforts of the petitioner to carry any burden whatsoever to establish illegality under Sec. 2511 (2) (d). Now, the Court of Appeals has by its ruling given the government a second chance to submit proper proof, this time without a jury making such a determination under proper instructions.

A ruling by the Court placing the burden of negativing the existence of the subexceptions would do much to eliminate the uncertainty in this area.

V.

The Court should decide that the tort of breach of the right of privacy is a tortious or other injurious act within the meaning of 18 U.S.C. Sec. 2511(2)(d).

The Court of Appeals rejected the argument that the tort of the breach or invasion of the right of privacy was a tortious or injurious act within the meaning of the Sec. 2511(2)(d) subexceptions. This is also a matter of first impression and one of transcending importance. It is difficult to imagine more comprehensive language than "tortious or other injurious acts." It is clear that a tort means activities generally accepted as a tort, and it would appear that not being satisfied with a mere descriptive term, the Congress made certain that other reprehensible acts would be covered although not technically recognized as criminal or tortious in nature.

The Court should make certain that there can be no mistake about this, particularly in view of decisions like *Smith* v. *Cincinnati Post & Times*, 475 F.2d 740 (6th Cir.

1973), which held that it was permissible for a party to record a conversation and give the tape to a newspaper. Use of one's memory is one thing, but to secretly record the exact words, the intonations of one's voice, and the like, all without the knowledge of the recorded person, appears incompatible with generally accepted rights of a person to be left alone, and to be free of demeaning exposure to electronic devices.

This is not the proper place to engage in an exhaustive discussion of the common law right of privacy. However, no discussion of common law rights to privacy is complete without mentioning Warren and Brandeis: *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890). This is a famous writing and its ideas and arguments helped form the basis of many legal actions and writings.

The Supreme Court has recognized the right in various contexts and circumstances. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Katz* v. *United States*, 389 U.S. 347 (1967).

There are many lower court decisions holding similarly. *People by Ford* v. *Doorley*, 338 F.Supp. 574 (D.C. R.I. 1972); *Dietemann* v. *Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Paramount Pictures* v. *Leader Press*, 24 F.Supp. 1004 (W.D. Okla. 1938); *Hazlitt* v. *Fawcett Publications*, 116 F.Supp. 538 (D. Conn. 1953) applying Oklahoma law.

At least 32 state jurisdictions now have clearly recognized the tort of the invasion of privacy.[8] Eminent writers have proclaimed the viability of the tort. Pound, *The Fourteenth Amendment and the Right to Privacy*, 13 W.L.

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8. Source: *Rugg* v. *McCarty*, 173 Colo. 170, 476 P.2d 753 (1970).

Rev. 34 (1961); R. Clark, *Crime in America*, 287 (1970); Hufstedler, *The Directions and Misdirections of a Constitutional Right to Privacy*, p. 24;[9] W. Prosser, *Law of Torts*, Sec. 112 (3d ed. 1964); S. Hofstader and G. Horowitz, *The Right of Privacy* (1964); F. Harper and F. James, Jr., *The Law of Torts* (1956); M. Ernst and A. Schwartz: *The Right to Be Let Alone* (1st ed. 1962).

It is difficult to attribute to Congress an intent to exclude the outrageous conduct of Davis and his group from the reach of the subexceptions in Sec. 2511(2)(d). Furthermore, what does "other injurious act" mean? We suggest that the meaning of the comprehensive and broad language used in the subexceptions should be interpreted and explained by the Court to mean exactly what they say since it now appears that the lower courts may not understand the breadth of the subexceptions, all of which could result in fines and imprisonments based on miscomprehension and faulty construction of statutory language.

It is even more imperative that the Court construe the language in the subexceptions since Congress appears to have intended a broad construction. Senate Report (Judiciary Committee) No. 1097 and House Report (Judiciary Committee) No. 488, contain these pertinent comments relating to the then proposed act:

> "* * * All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the

9. Delivered before the Association of the Bar at New York in 1971.

> victim of an unlawful invasion of privacy. * * * *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.* Each of these objectives is sought by the proposed legislation." (U. S. Code Cong. and Ad. News, p. 2156-1968).[10]

Meredith v. *Gavin*, 446 F.2d 794 (8th Cir. 1971) entered into a full discussion of one-party consensual interceptions under the subexceptions. The court quoted Senator Hart who had objected to the statute as originally proposed because it did not contain the subexceptions under discussion here. He stated he would not tolerate the consent of one party as being a defense, or to make the taping then admissible in legal proceedings. As he pointed out on the floor of the Senate:

> "For example, the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him." (p. 798)

The court also quoted this language:

> "The use of such outrageous practices is widespread today, and I, Senator Hart, believe they constitute a serious invasion of privacy." (p. 798)

Senate Report No. 1097, 90th Cong.2d Sess. 1969, at page 69, contains the following comment:

> "The need for comprehensive, fair and effective reform setting uniform standards is obvious. *The protections for privacy must be enacted.* Guidance and super-

10. This passage was quoted with the same emphasis supplied in *Gelbard* v. *United States*, 408 U.S. 41 (1972).

vision must be given to State and Federal law enforcement officers."[11]

Finally, this language from the Senate Report:

"No aspect, including the identity of the parties, the substance of the communication between them, or the fact of a communication itself is excluded. The privacy of the communication to be protected is intended to be comprehensive." (p. 91)

We respectfully submit that the subexceptions be interpreted to include within their ambit the tort of the breach of the right of privacy. The electronic explosion is too immediate and all-encompassing to defer consideration of this question to a later date.

VI.

The special grand jury did not have jurisdiction to return the indictment herein where the matters alleged and sought to be proved in order to obtain a conviction under Count II thereof related to events that could only have occurred in the Northern District of Oklahoma, and did not tend to impede or influence its investigation.

It is urged that the Supreme Court should finally delineate and circumscribe the jurisdiction of sitting grand juries so as to afford protection to those whose knowledge and information pertain to matters outside the grand jury's jurisdiction.

In the case at bar, the pertinent parts of the inquiry as to the petitioner were directed solely at local law en-

11. Quoted in *Gelbard* v. *United States, supra,* at page 49, with same emphasis.

forcement and problems of the state of Oklahoma, not Missouri. In fact, the very first question to the petitioner before the grand jury made reference to "local law". Another question relates to "that area". Oklahoma is liberally referred to as well as Oklahoma private clubs and the Shangri-la. Also mentioned are "local authorities". Those portions of petitioner's grand jury testimony read to the jury related to northeast Oklahoma only, as does the *entire* taped conversation. No effort was made to expand the charge against the petitioner beyond the borders of Oklahoma, and in particular, the local area in which the petitioner lived, practiced, and had been serving as a state senator. The only effort to show materiality was made when the court advised the government that it had failed to show such materiality, and after much discussion, permitted it to put into evidence, in wholesale fashion through a court reporter's testimony, a number of transcripts of witnesses who appeared before the special grand jury. The batch of transcripts was received into evidence over strenuous objections as to materiality and hearsay. Not one grand jury witness was called to testify.

Nowhere in the grand jury evidence was there the slightest indication that the petitioner was in any way connected with any illegal activities, even in Oklahoma, much less Missouri, or in interstate commerce. Indeed, we submit that the mere statement of a prosecutor before a grand jury, as an introduction to questioning a witness, that he is interested in a certain person, place or activity, does not confer jurisdiction upon the grand jury so as to in turn confer materiality on the type of questions and answers propounded to and given by a witness.

A leading case dealing with the materiality of answers given in the course of a grand jury investigation is *Brown*

v. *United States*, 245 F.2d 549 (8th Cir. 1957). *Brown* held that where evidence established that a grand jury caused defendant to be brought before it for the purpose of extracting testimony from him with the view to prosecute him for perjury, and without any purpose of obtaining *from him* any evidence upon which it could find a true bill against anyone for any offense committed in whole or in part in Nebraska, such grand jury was acting beyond its powers, and answers of the defendant, even if false, could not amount to perjury or be made the basis of a prosecution therefor.

We concede that the scope of the special grand jury's inquiry involved other persons and activities which formed a nexus with the district of Oklahoma, but insofar as this petitioner is concerned, this is not so. The petitioner was indicted on questions and answers which concerned northeast Oklahoma residents and activities within that area only. The entire 90 pages of the petitioner's grand jury testimony, with the exception of some names and the displaying of several photographs to him, revolved around local Oklahoma politics, problems, and such other matters. Under *Brown*, the answers were immaterial, thus defeating the grand jury's jurisdiction to indict petitioner.[12]

The Court of Appeals disposes of this argument by simply referring to the grand jury transcripts. We submit that the test is what would have been the result if the petitioner had said, "yes", he had told Davis and his group, while being secretly taped, that he could control Frank Grayson, the Miami County, Oklahoma district attorney. Davis and his group were discussing liquor by the drink

12. Accord: *United States* v. *Becker*, 203 F.Supp. 167 (E.D. Va. 1962); *United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973).

and the possibility of having some slot machines such as is countenanced in the V.F.W., Elks, and Country Clubs in Miami, Oklahoma. There was no reference whatsoever, or even the slightest innuendo, that the Davis group and the petitioner were concerned with Kansas City interests, or even knew about them. The Court of Appeals was in error when it expanded the grand jury's jurisdiction to include the substance of the taped communication on the grounds that the petitioner by his answers to material questions had impeded the investigation of the grand jury.[13]

The Supreme Court has never delineated the precise limits of the teachings of *Brown*. It is of vital importance that the grand jury's jurisdiction be circumscribed within reasonable and clear perimeters if continued public confidence in the grand jury system is to be expected.

VII.

The questions and answers alleged in Count II of the indictment do not comport with the standards laid down by the Supreme Court in Bronston v. United States, 409 U.S. 352 (1973).

Bronston teaches us that a questioner in a perjury case must be precise in his questions, and that the answers must be directly responsive. If the question is too broad, the answer may be declared unresponsive no matter what it is. It is urged that the broad, rambling, ambiguous and imprecise nature of the questions upon which this prosecution is based, which are gleaned from 90 pages of the same type of questions, do not measure up to *Bron-*

13. *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Fraser* v. *United States*, 145 F.2d 145 (6th Cir. 1944); *United States* v. *Icardi*, 140 F.Supp. 383 (D.C. D.C. 1956); *United States* v. *Cross*, 170 F.Supp. 303 (D.C. D.C. 1959).

ston standards.[14] As the Court pointed out in *Bronston*, the burden is on the examiner to pin the witness down to the *specific* object of the questioner's inquiry. Furthermore, it appears to be simple justice that instead of broad questions, the examiner should be required to limit himself to clear, simple questions narrowed to circumstances that are precisely ascertainable so that the witness can direct his attention and memory processes to the exact context and circumstances about which he is being questioned. Such characteristics are notably lacking here, and it can be safely said that the questioning during the grand jury investigation, and the questions chosen therefrom, were propounded in utter disregard of the Court's admonition in *Bronston*:

> "Precise questioning is imperative as a predicate for the offense of perjury." (409 U.S. at 362)

Accord: *United States* v. *Lattimore*, 127 F.Supp. 405 (D.C. D.C. 1955), affd. 232 F.2d 334 (D.C. Cir. 1955); *United States* v. *Esposito*, 358 F.Supp. 1032 (D.C. N.D. Ill. 1973); *United States* v. *Razzaia*, 370 F.Supp. 577 (D.C. Conn. 1973); *United States* v. *Cook*, 489 F.2d 286 (9th Cir. 1973).

CONCLUSION

The Court of Appeals' remand for the limited purpose of determining the existence or non-existence of the subexceptions contained in 18 U.S.C. Sec. 2511(2)(d) is in conflict with this Court's decision in *Whiteley* v. *Warden of Wyoming Penitentiary, supra,* and has so far departed from the accepted and usual course of judicial proceedings

14. See Appendix C, *infra*, pp. A49-A52 for questions and answers.

so as to call for the exercise of the Court's power of supervision.

The allocation of the burden of proof relating to the subexceptions contained in the Federal Wire Interception and Interception of Oral Communications Act, Sec. 2511 (2)(d), is an important question of federal law which has not been, but should be decided by the Court. The right to a trial by jury of the issues raised by the said subexceptions is also an important question of federal law which has not been, but should be settled by the Court.

Whether the government's prosecution should be dismissed because of failure to negative the existence of the said subexceptions is an important federal question, never previously decided, which should also be settled by the Court.

Also previously undecided is the important federal question of whether the tort of breach or invasion of the right of privacy was intended by the Congress to be tortious conduct within the meaning of the subexceptions contained in 18 U.S.C. Sec. 2511(2)(d), and should be settled by the Court.

Whether the Court's decision in *Bronston* v. *United States, supra,* has been followed by the Court of Appeals is a question which should be decided by the Court.

And, finally, the scope and perimeters of a federal grand jury's jurisdiction when probing activities in another federal district has never been directly examined and delineated by the Court, and should be settled now, particularly under the facts of this case.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue from the Honorable Court to review

the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1413

United States of America,
Appellee,

v.

William Fred Phillips,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 3, 1975
Filed: June 29, 1976

Before GIBSON, Chief Judge, LAY and ROSS, Circuit Judges.

ROSS, Circuit Judge.

William Fred Phillips appeals his conviction of perjury in violation of 18 U.S.C. § 1623. The case was submitted to a jury which returned a guilty verdict. We vacate the conviction and remand with directions for further proceedings.

Phillips was prosecuted for knowingly making material false statements before a grand jury convened in Kansas City, Missouri. The grand jury was convened in December 1971 to investigate a conspiracy involving cer-

tain persons engaged in organized crime from Kansas City and certain nightclub owners from northeastern Oklahoma. The objective of the conspiracy was to establish illegal gambling and prostitution activities in the Oklahoma nightclubs by offering bribes to local government officials in return for protection from the law.

One of the principals was Frank Grayson, an Oklahoma district attorney, who was providing protection for gambling at certain local clubs. Defendant Phillips, then a practicing attorney and Oklahoma state senator, was a close friend and political supporter of Grayson. Grayson testified before the grand jury that certain persons had told him that Phillips had stated that he could control Grayson with respect to illegal club operations. Specifically, Grayson testified that Charles Davis, owner of a major development named Shangri La Lodge, told him that Phillips stated he could arrange anything that Davis needed in the way of local protection.

In this context, Phillips was called before the grand jury on August 1, 1972. Defendant repeatedly denied that he had ever stated to anyone that he could arrange protection from local law enforcement officials. He specifically denied that he made any representations to persons affiliated with the Shangri La that he could control local law enforcement officials with respect to illegal gambling, liquor, narcotics or prostitution.[1]

The critical evidence admitted at trial was a tape recorded meeting between Phillips, Davis and George Overton, manager of the Shangri La. The conversation was recorded on July 7, 1971, at a time when Phillips was representing Davis and Overton before the Grand River Dam Authority regarding certain improvements of the Shangri

1. See note 7, *infra*.

La. The conversation was recorded by a private detective, not under color of law, at the instigation of Davis and Overton. Phillips was not aware that the conversation was recorded.

The apparent purpose of the July 7 meeting was to settle on a fee arrangement between Phillips and the Shangri La management. The purpose of recording the conversation is unknown.

During the course of the meeting, Phillips told Davis and Overton that illegal liquor and gambling operations could be run at the Shangri La on a limited basis. At one point, Phillips stated, "I can, I can control Frank[,]" in obvious reference to district attorney Grayson. At trial, the government's theory was that Phillips' statement was a representation that he could induce Grayson to provide protection for illegal operations at the Shangri La.

Before trial, defendant filed a supplemental motion to suppress the tape recording on the grounds that the conversation was recorded in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, *et seq.* Defendant also moved to suppress the tape recording on the grounds that he was not admonished of his *Miranda* rights before the grand jury. The motion was denied in all respects and the tape and its contents were admitted at trial.

The case was originally assigned to Judge Duncan who ruled on all pretrial motions and presided throughout the trial. At the conclusion of trial, defendant moved for a directed acquittal and a new trial. The motions were pending when Judge Duncan died on July 31, 1974. Judge Hunter was then assigned to the case. Pursuant to FED. R. CRIM. P. 25(b), Judge Hunter certified that he could fairly and adequately dispose of the post-trial motions.

After reviewing the record, Judge Hunter denied defendant's motions for acquittal and a new trial.

Defendant alleges numerous points of error on this appeal. Because of the limited nature of our remand, we review all of these contentions.

I. *The Admissibility of the Tape Recording under 18 U.S.C. § 2511(2)(d).*

Defendant's supplemental motion to suppress alleged that the conversation between himself, Davis and Overton was recorded for the purpose of committing a tortious act in violation of 18 U.S.C. § 2511(2)(d). No evidence was adduced before or during trial as to why Davis and Overton caused the conversation to be recorded. Defendant argues that the government held the ultimate burden of proving that the conversation was not recorded for any criminal, tortious or other injurious purpose, and, since no evidence was proffered in this regard, the tape should have been suppressed. While we hold that the ultimate burden rested with the defendant to show that the tape was "unlawfully" recorded, our review of the record convinces us that defendant was denied a meaningful opportunity to meet this burden. Accordingly, we vacate the judgment of conviction and remand for a hearing in order to afford the parties an opportunity to present evidence as to the purpose of the recording.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 sets forth a comprehensive legislative scheme regulating the interception of oral and wire communications. This legislation attempts to strike a delicate balance between the need to protect persons from unwarranted electronic surveillance and the preservation of law enforcement tools needed to fight organized crime. S. Rep. 90-1097, U. S. CODE CONG. & ADMIN. NEWS 2112, 2153-2158 (1968).

Section 2511(1)(a) generally prohibits the willful interception of any wire or oral communication. Section 2511(2)(d) provides an exception and subexception to the general rule. That section reads as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception *unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.* (Emphasis supplied.)

This section was missing from Title III when the bill was first reported out of committee. S. Rep. 90-1097, U. S. CODE CONG. & ADMIN. NEWS 2112, 2182 (1968); *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971). At the urging of Senators Hart and McClellan however, § 2511(2)(d) was added to the bill, 114 Cong. Rec. 14695 (May 28, 1968), "* * * to prohibit a one-party consent tap, [where the monitoring is conducted not under color of law,] except * * * for private persons who act in a defensive fashion." *Id.* at 14694. In the words of Senator Hart:

> * * * [W]henever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of title III and will also be subject to a civil suit. Such one-party consent is also prohibited when the party acts in any way with an intent to injure the other party to the conversation in any other way. For example the secret consensual re-

cording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other situations when the party acts out of legitimate desire to protect himself and his own conversations from later distortions or other unlawful or injurious uses by the other party.

Id. The effect of § 2511(2)(d), then, is to prohibit any interception, use or disclosure of oral or wire communications by a person not acting under color of law where the purpose is to commit any criminal, tortious or injurious act. *Meredith v. Gavin, supra,* 446 F.2d at 798. This determination must be made on a case-by-case basis. *Id.* at 799.

18 U.S.C. § 2515 imposes an evidentiary sanction to compel compliance with § 2511. That section provides that any oral communication intercepted in violation of the Act shall not be received in evidence in any judicial proceeding.[2] Section 2515 is not self-executing however. Section 2518(10)(a) provides that any aggrieved person may file a motion to suppress the contents of any unlawfully intercepted oral communication. This section "* * * provides

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2. Section 2515 reads:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

the remedy for the right created by section 2515." S. Rep. 90-1097, U. S. CODE CONG. AND ADMIN. NEWS 2112, 2195 (1968). Thus, as the government asserted at oral argument, whether the conversation was recorded for a permissible or impermissible purpose is a matter of suppression properly cognizable at a pretrial suppression hearing. *Id.*

Under traditional search and seizure law, "[t]he burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed." *Nardone v. United States,* 308 U.S. 338, 341 (1939). *Accord, Canaday v. United States,* 354 F.2d 849, 857 (8th Cir. 1966); *United States v. Polizzi,* 500 F.2d 856, 910 n.6 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975); *United States v. Maggadino,* 496 F.2d 455, 459-460 (2d Cir. 1974); *Nolan v. United States,* 423 F.2d 1031, 1041 (10th Cir. 1969), *cert. denied,* 400 U.S. 848 (1970). The prima facie burden of proving the ultimate illegality should be distinguished from the burden to prove taint flowing from that illegality. "* * * [W]*hen an illegal search has come to light,* [the government] has the ultimate burden to show that its evidence is untainted." (Emphasis supplied.) *Alderman v. United States,* 394 U.S. 165, 183 (1969).

Available legislative history in regard to §§ 2511(2)(d) and 2515 reflects no congressional desire to change the traditional burden of proof with respect to suppression of electronically gathered evidence. As stated in S. Rep. 90-1097, U. S. CODE CONG. AND ADMIN. NEWS 2112, 2185 (1968):

> [Section 2515] must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. *It largely*

reflects existing law. It applies to suppress evidence directly (*Nardone v. United States,* * * *, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States,* * * * 308 U.S. 338 (1939).) There is, however, no intention to change the attenuation rule * * * [,] [*n*]*or generally to press the scope of the suppression role beyond present search and seizure law.* (Emphasis supplied.)

We perceive sound reasons for preserving the traditional allocation of burden of proof in this context. Sections 2511(2)(d) and 2515 require the exclusion of an intercepted communication if it was intercepted for *any* criminal, tortious or other injurious purpose. To require the government or any other party to prove as a matter of foundation that an interception was made for *no* criminal, tortious or other injurious purpose would create an impossible burden of proving three negatives. Logic requires that the party against whom the evidence is offered, the defendant here, carry the ultimate burden of alleging and proving the specific criminal, tortious, or other injurious purpose for which the interception was made.

This is not a case where the fact to be proved is a material part of the act proscribed. *Compare Mullaney v. Wilbur,* 421 U.S. 684, 702 (1975) (government must prove beyond a reasonable doubt the absence of heat of passion on sudden provocation in a homicide case); *United States v. Harpel,* 493 F.2d 346, 351 (10th Cir. 1974) (government must prove beyond a reasonable doubt that the contents of a wire or oral communication were acquired through a device other than a telephone used in the ordinary course of business); *United States v. McCann,* 465 F.2d 147, 162 (5th Cir. 1972), *cert. denied,* 412 U.S. 927 (1973) (government not required to prove inapplicability of consent exception under § 2511). Indeed, in this case

the fact to be proved, the purpose of the recording, has no relation to the act proscribed, the crime of perjury. Thus due process is not offended by requiring the defendant to shoulder the ultimate burden of proof under §§ 2511(a)(d) and 2515. *Nardone v. United States, supra,* 308 U.S. at 341.

It is clear however that a party seeking to suppress such matter must be given a full and fair opportunity to meet his or her burden of proof.[3] Our review of the record convinces us that defendant was effectively denied this opportunity in the court below.

Because of pretrial discovery, this point was not raised until the eve of trial. Nevertheless, at that time the defendant filed his supplemental motion to suppress claiming that the conversation was recorded for a tortious purpose. The motion was orally raised the next morning in the trial judge's chambers. The motion was summarily denied before defense counsel was given any opportunity to make a statement or offer evidence in support of the motion. The trial judge expressed the view at this time that any such evidence would be admissible for impeachment purposes only. At trial, defense counsel attempted to pursue the subject with George Overton, manager of the Shangri La. The government objected to this line of questioning on the grounds of irrelevancy and the objection was sus-

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3. Our disposition does not relieve the government of its obligation under 18 U.S.C. § 3504(a)(1) to affirm or deny the occurrence of the alleged unlawful act. On remand, the trial judge should require the government to call the parties responsible for the interception and to establish a legal purpose for the interception. If this obligation is met, the defendant must prove, by a preponderance of the evidence, the existence of one of the exceptions listed in § 2411(2)(d). The risk of nonpersuasion shall remain with the defendant.

We do not decide on whom the burden rests when the de- exceptions listed in § 2511(2)(d). The risk of nonpersuasion contained in § 2511(2)(d).

tained. Thus, the dearth of evidence on the issue,[4] which both parties acknowledge, was largely created by the unwillingness of the trial judge to allow defense counsel to pursue this line of inquiry. Under these circumstances, we find it necessary to remand to the district court for a hearing to determine the purpose for which the conversation was recorded. *See United States v. Rose*, 526 F.2d 745, 749-750 (8th Cir. 1975). If the recording was made for a legitimate purpose, the judgment of conviction must be reinstated. If, however, the defendant proves by a preponderance of the evidence that the recording was made for a criminal, tortious or other injurious purpose, the tape must be suppressed. If the tape is suppressed, a new trial will be necessary.[5]

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4. In its opinion, the district court stated that the evidence showed that the recording was made by Davis and Overton for no other purpose than to protect their bargaining position with respect to any employment arrangement reached with Phillips. *United States v. Phillips*, No. 73-CR-38-W-3-D (W.D. Mo., filed April 10, 1975), slip op. at 15. We find no such evidence in the record. The evidence shows only that this was the purpose of the meeting. The evidence fails to disclose why Davis and Overton caused the meeting to be recorded.

5. We reject defendant's argument that the recording in question constituted a "tortious" invasion of his right of privacy under § 2511(2)(d). Under this theory, any interception, whether recorded for a legitimate purpose or not, would be unlawful and excluded. This is not the construction intended. *See Meredith v. Gavin*, 446 F.2d 794, 798-799 & n.5 (8th Cir. 1971). Furthermore, each willing participant in a conversation takes the risk that another participant may divulge the contents of that conversation. If the conversation is divulged, whether by memory of the participant or by electronic reproduction, there is no violation of any privacy right. *Cf. Rathbun v. United States*, 355 U.S. 107, 111 (1957); *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973). Except as set forth above, we express no opinion as to whether this recording was made "for the purpose of committing any criminal or tortious act in violation of the laws of the United States *or of any State* or for the purpose of committing any injurious act[,]" under § 2511(2)(d). (Emphasis supplied.) This determination must first be made by the trial court based on the evidence adduced by the parties and upon relevant federal and state laws.

(Continued on following page)

II. Jurisdiction and Materiality.

Defendant next contends that the questions asked of him were not material to any proper inquiry of the special grand jury. Since the questions were immaterial, he argues, the grand jury lacked jurisdiction and the government failed to prove an essential element of the offense.[6]

Under 18 U.S.C. § 1623, "* * * a perjury conviction may not be based upon testimony not material to any proper inquiry of a grand jury." *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973). Materiality is a question of law to be determined by the trial judge bearing in mind the broad investigatory powers of a grand jury to uncover violations of federal law. *Id. See also Masinia v. United States*, 296 F.2d 871, 874 (8th Cir. 1961); *Brown v. United States*, 245 F.2d 549, 554 (8th Cir. 1957). The burden of proving materiality, of course, rests with the government. *United States v. Koonce, supra*, 485 F.2d at 381. The criterion for determining materiality in this Circuit is whether or not the statements alleged to be perjurious tend to impede or hamper the course of the investigation by the grand jury. *United States v. Lasater*, No. 75-1935 (8th Cir., filed May 17, 1976), slip op. at

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Footnote continued—

We also reject the government's argument, based on *Meister v. Commissioner*, 504 F.2d 505, 508-511 (3d Cir. 1974), that the tape is independently admissible because the government had no part in the decision to record or the actual recording of the conversation. *Meister* emphasizes only that the fourth and fifth amendments proscribe government action, not private action. We are concerned here with a specific statutory directive that certain conversations which are electronically intercepted by private persons are not admissible in any official proceeding.

6. Materiality is essential to the jurisdiction of the grand jury. *See Brown v. United States*, 245 F.2d 549, 555 (8th Cir. 1957). Materiality is also an essential element of the crime of perjury under 18 U.S.C. § 1623. *See United States v. Lasater*, No. 75-1935 (8th Cir., filed May 17, 1976), slip op. at 11.

11; *United States v. Koonce, supra,* 485 F.2d at 380; *La-Rocca v. United States,* 337 F.2d 39, 43 (8th Cir. 1964).

Defendant argues that the questions were not material because each related to matters of purely local (Oklahoma) concern and thus were not proper for consideration by a grand jury convened in Kansas City, Missouri. We disagree.

The grand jury transcripts admitted at trial show that the grand jury was investigating a conspiracy between certain Kansas City persons associated with organized crime and other persons affiliated with local nightclubs in northeastern Oklahoma. The purpose of the conspiracy was to establish illegal gambling, liquor and prostitution activities in Oklahoma. The method used to accomplish this objective was the corruption of local Oklahoma law enforcement officials. Interstate travel and communication were indisputably involved in the conspiracy.

Two of the central figures in the conspiracy were district attorney Grayson and Jess Roberts. Both individuals were connected to defendant Phillips during the course of the investigation. Testimony before the grand jury from various witnesses, including Grayson himself, established that Phillips had represented to others that he could "control" Grayson. Other testimony established that Phillips had represented coconspirator Roberts in regard to raids conducted against Roberts' club operation.

It is well settled that "• • • if a conspiracy is what the inquiry is directed at, the acts and conduct of the alleged conspirators that may have occurred in a district other than that where the grand jury is sitting may be gone into." *Brown v. United States, supra,* 245 F.2d at 554; *Masinia v. United States, supra,* 296 F.2d at 875. When Phillips was called before the grand jury,

it was reasonably believed that certain actions on his part had interstate conspiracy implications. That the grand jury focused on conduct of Phillips which took place only in Oklahoma did not defeat its jurisdiction or render the questions immaterial.

Defendant also argues that the questions were not material because the prosecution and the grand jury had access to the tape and its contents before Phillips was called to testify. Again, we cannot agree.

The latitude of materiality with respect to questions asked of a witness during a grand jury investigation is quite broad. *United States. v. Calandra,* 414 U.S. 338, 343-344 (1974); *United States v. Paolicelli,* 505 F.2d 971, 973 (4th Cir. 1974); *United States v. Stone,* 429 F.2d 138, 140 (2d Cir. 1970). As stated in the *Stone* case:

> • • • [M]ateriality of statements made in a grand jury investigation may more readily appear than that of similar evidence offered on an issue in civil or criminal litigation, since the purpose of the investigation is to get at facts which will enable the grand jury to determine whether formal charges should be made against someone rather than prove matters directly at issue. • • • Leads to further inquiry may be of material worth to an investigation.

Id. at 140; *see also United States v. Paolicelli, supra,* 505 F.2d at 973; *United States v. Lardieri,* 497 F.2d 317, 319 (3d Cir. 1974). A grand jury investigation is not carried out until every available clue had been run down and all witnesses have been properly examined to discover whether a crime has been committed. *United States v. Calandra, supra,* 414 U.S. at 344, *quoting, United States v. Stone, supra,* 429 F.2d at 140.

Phillips' denials clearly frustrated the investigation of the grand jury. In pursuing its investigation with an open mind, the grand jury had to know the truth about Grayson's testimony respecting Phillips' statements that he could control Grayson. Phillips' testimony clouded that issue. Furthermore, Phillips' blanket denials frustrated possible inquiry into other areas such as possible connections between illegal operations at the Shangri La and persons associated with organized crime in Kansas City. By testifying that he could not put a fix on Grayson, Phillips frustrated any further fruitful investigation into legitimate matters before the grand jury. Therefore, we hold that the grand jury was acting within its jurisdiction when Phillips testified and that the questions asked of him were material to the investigation.

III. The Literal Falsity of Defendant's Testimony.

Defendant next argues that his testimony before the grand jury was not literally false under *Bronston v. United States*, 409 U.S. 352 (1973). He contends that the government's questions in regard to influence peddling were ambiguous and his responses thereto unresponsive and literally true. We disagree.

In *Bronston*, the Supreme Court reversed a perjury conviction because the defendant's answers, upon which the prosecution was based, were unresponsive to the questions asked and literally true. The Court held that a willful statement which merely *implies* a material matter known to the witness to be untrue does not constitute perjury. *Id.* at 357-358.

Bronston is plainly inapposite. In this case, the government's questions were clear and understandable, not prolix and ambiguous as defendant argues. Phillips' responses were unequivocal. Government counsel initially

asked Phillips whether he had told anyone associated with any club that he could influence Grayson with respect to illegal operations. Phillips responded no. Thereafter, government counsel asked specifically whether defendant had made such representations to persons operating the Shangri La. Phillips again responded no.[7]

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7. The grand jury transcript, at 77-89, reads as follows:

Q Now, as you have seen today, I have been in and out of the room, unfortunately. I don't know if my associate here has covered all of these areas and I just hope you will excuse me if I am repetitious, but I would like to ask you a summary question, whether or not you have ever suggested, represented or any words to that effect to any person that you had the power to influence any public official with respect to gambling or prostitution activities?

A No. No. Absolutely not.

Q Now, we have reason to believe that certain Kansas City hoodlum figures, persons associated with the criminal element in the Kansas City area, are attempting or have attempted to establish gambling, protitution, illegal liquor and other illegal activities in Oklahoma. We know and have documented that certain of these Kansas City hoodlums have visited Oklahoma and that they visited and talked with and perhaps had business dealings with a number of the club operators down there, which would include Jess Roberts, Jack King, people at the Shangri-la, possibly others. We are interested and are very eager to determine whether or not these persons may have talked with the local operators down there about how they could secure protection when they moved their lilegal activities in or when they began engaging in illegal activities.

A I—

Q Consequently it's very important for us to know if you have ever had discussions with anyone, particularly persons who are associated with private clubs of any kind, and I mean private clubs or country clubs or the Shangri-la or any activity of that sort, in which you have represented that you had the power to influence the action of public officials with respect to prostitution, narcotics—excuse me, I didn't mean to say narcotics—

A Well, I want you to put narcotics in there.

Q All right, whether or not you have ever indicated to any person associated with any private club operation of any nature, including country clubs or the Shangri-la or any others, that you had the power to influence any public of-

(Continued on following page)

Our independent review of the tape recording indicates that Phillips' answers were literally false. The tape contains the following colloquy between Phillips, Overton and Davis:

> O: Well, here I was gonna ask a direct question. (Pause) Can I go back—you said this project, now there is another major area that I can see that there might be problems in and there might not and we, the three of us sitting here, recognize the operation of our club as a potential problem. Now, could we, can we, depend on Fred Phillips . . .
>
> P: I can, I can control Frank.
>
> O: . . . to help us in that area without, ah, let's just putting as Mr. Davis said a while ago, just put-

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Footnote continued—

> ficial with respect to prostitution, narcotics, liquor or gambling activities?
>
> A No, sir, I have never ever just carte blanche.

The questioning then focused on the Shangri La:

> Q Now, pursuing our original line of questioning, we also have indications that we have satisfied ourselves that a number of these Kansas City People visited the Shangri-la on at least one and possibly more occasions and conducted some rather elaborate business discussions or meetings there, and can you tell us whether or not you have ever had any discussion with any of the owners or operators, and I know there was a George Overton—
>
> A George Overton.
>
> • • •
>
> Q Not to affect law enforcement with respect to the liquor or gambling, prostitution or narcotics, right?
>
> A Yes.
>
> Q She has to get an audible answer.
>
> A I did not make a statement that he could in any way.
>
> Q Right. To rephrase the question, the conversations which you had with any representatives of the Shangri-la were never to the effect that you could furnish any protection from local law enforcement authorities.
>
> A No. No.

> ting our cards on the table, without having say to come up with another legal fee for that. Ah, in the next twelve months or whatever, you know, reasonable period . . .
>
> P: Now, there you're getting into politics there and the only thing you get in trouble on that is if it would be down state where I'd have, have advance notice of any kind of problems, if they was getting a kick, out of a kick, from some of the local people. You do it, other people's gonna want to do it. They can't. In other words, it's got to be this place and only this place, if you do what you want done and then, course, Frank's gonna take the heat. Well, he's locked in here for four years and I think you know—you've heard the stories that I ran Frank and he wasn't even here.
>
> O: He was a resident up in or—not a resident . . .
>
> P: Yeah, he was registered here, had residence here, but it was, hell, he was clear out, back East someplace and this was something had to be done. But I don't mean to be, blow things out of perspective, you know, that I'm bigger than I am. I know I'm not. But I know what I can do and it won't make me mad a bit. In other words if you don't want to go on the deal, fine. But I mean what I'll earn every dime I make from it. I mean that, you pay me, I know that, Mr. Davis.

This discussion was followed by representations of Phillips that the Shangri La could conduct illegal gambling operations on a limited basis.

At trial, Phillips repeatedly admitted the accuracy of the contents of the tape. We agree with the district court's determination that the defendant's testimony before

the grand jury was not only responsive but literally false. *See United States v. Parr*, 516 F.2d 458, 470 (5th Cir. 1975); *United States v. Paolicelli, supra*, 505 F.2d at 973; *United States v. Nickels*, 502 F.2d 1173, 1178 (7th Cir. 1974), *appeal docketed*, 44 U.S.L.W. 3009 (U.S. July 22, 1975) (No. 74-735); *United States v. Isaacs*, 493 F.2d 1124, 1155 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

IV. Miranda Rights.

Phillips also argues that the tape recording should have been suppressed because he was not admonished of his *Miranda* rights when called before the grand jury. Relying heavily on *United States v. Mandujano*, 496 F.2d 1050 (5th Cir. 1974), he claims that because the investigation had focused on him as a virtual or putative defendant, he was entitled to the *Miranda* litany.

We note initially that defendant's suppression motion in this respect was misdirected. Even assuming error under *Miranda*, the grand jury testimony, not the tape recording, was the fruit of such error. Thus, only the grand jury testimony would require suppression in any event. Construing defendant's motion broadly however, we proceed to discuss the merits of the *Miranda* question.

The Supreme Court has recently reversed the *Mandujano* case, the authority upon which defendant principally relies, holding unanimously that *Miranda* rights are not required in the grand jury context. *United States v. Mandujano*, 44 U.S.L.W. 4629 (U.S. May 19, 1976) (No. 74-754). In a plurality opinion in which three members of the Court joined, Chief Justice Burger carefully distinguished between custodial interrogation, to which *Miranda* was addressed, and interrogation before a grand jury, which is involved in this case.

> The Court [in *Miranda*] thus recognized that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial police interrogation. * * * To extend these concepts to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in *Miranda*; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court. (Citations omitted.)

Id. at 4634. The plurality concluded that even if the defendant was a putative defendant before the grand jury, that fact had no bearing on the validity of a conviction for testifying falsely. *Id.* at 4635.

Mr. Justice Stewart, in a concurring opinion in which Mr. Justice Blackmun joined, stated the following:

> The Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." (Citations omitted.)

Id. at 4643.

We hold that the failure of the prosecutor to admonish Phillips of his *Miranda* rights did not violate defendant's privilege against self-incrimination. Phillips was under oath to tell the truth before the grand jury. When he proffered false answers, "* * * he took 'a course that the Fifth Amendment gave him no privilege to take.'"

Id. at 4636, *quoting United States v. Knox*, 396 U.S. 77, 82 (1969) (Mr. Justice Brennan, concurring). It is true that the prosecutor failed to inform Phillips of his right against self-incrimination as well as his other *Miranda* rights. But it would be incredible to assume that defendant, a practicing attorney of many years, a former assistant county attorney, an Oklahoma state senator and former county judge, was not aware of his *Miranda* rights when he testified before the grand jury. *See Cargill v. United States*, 381 F.2d 849, 853 (10th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968). Phillips' decision to proffer false answers was in no way compelled; it was a voluntary decision on his part.[8]

V. *The Remaining Contentions.*

Defendant asserts several other points of error. We briefly discuss these points finding each to be without merit.

Phillips argues that the district court erred in denying his motions for directed acquittal at the conclusion of the government's case and at the close of all the evidence. Phillips' representations to Davis and Overton contained in the tape, coupled with his testimony before the grand jury, clearly constituted a submissible case of perjury for the jury.

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8. Defendant implies that the sole purpose of calling him before the grand jury was to entrap him into committing perjury. We reject this argument since any troubles caused defendant were brought upon by himself. Phillips was warned that he was a potential defendant. Grand Jury Transcript at 4. The government did not solicit Phillips to commit perjury. At most a situation was created where perjury appeared expedient. There is nothing in this record even remotely suggesting any prosecutorial misconduct which would require a finding of entrapment. *See United States v. Nickels*, 502 F.2d 1173, 1176 (7th Cir. 1974), *appeal docketed*, 44 U.S.L.W. 3009 (U.S. July 22, 1975) (No. 74-735); *LaRocca v. United States*, 337 F.2d 39, 42-43 (8th Cir. 1964).

Phillips argues that successor Judge Hunter abused his discretion in refusing to grant a new trial after the untimely death of Judge Duncan. Under such circumstances, the decision to grant a new trial is a matter committed to the sound discretion of the successor judge. *See* FED. R. CRIM. P. 25(b); *Connelly v. United States*, 249 F.2d 576, 579 (8th Cir. 1957). We refuse to disturb that discretion here. This is not an exceedingly complicated case. Our review of Judge Hunter's opinion convinces us that he adequately familiarized himself with the evidence and legal issues involved and fairly resolved defendant's post-trial motions.

Defendant also argues that the district court erred in excusing the jury during its deliberations. The record indicates that after deliberating for nearly two hours, certain members of the jury expressed concern for the safety of their cars which were parked in various garages surrounding the courthouse. Accordingly, the trial judge allowed the jury to separate in order to move their cars and eat dinner. We find no error in this regard. Whether members of the jury are allowed to separate is a matter resting squarely within the discretion of the trial judge. *Koolish v. United States*, 340 F.2d 513, 528 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965); *Hines v. United States*, 365 F.2d 649, 651 (10th Cir. 1966). Defendant has not alleged nor shown any prejudice resulting from this short separation.

Lastly, defendant argues that the trial judge erred in failing to inform defense counsel that he intended to instruct the jury that the tape recording was legally admissible into evidence. Defendant contends this failure prejudicially hampered his closing argument. This claim is frivolous. The question of admissibility of the tape was a legal question to be resolved by the trial judge, not

the jury. Defense counsel was repeatedly told throughout trial that the tape recording would be admitted.

The judgment of conviction is vacated, and the cause is remanded for further proceedings not inconsistent with the views expressed in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 73-CR-38-W-3-D

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM FRED PHILLIPS,
Defendant.

FINDINGS AND OPINION

(Filed April 10, 1975)

Case History

On February 8, 1973, a federal grand jury for the Western District of Missouri returned a two count indictment against the defendant, William Fred Phillips, charging that while under oath and testifying before the grand jury he willfully and knowingly made certain false material declarations in response to questions asked him by Government counsel. The essence of the charge brought by the Government was that the defendant had suggested and

represented to certain people that he had control over District Attorney Frank Greyson and that he could furnish protection from law enforcement for illegal gambling and liquor violations, and that defendant falsely denied to the grand jury making such declarations.

The defendant was given the customary omnibus proceedings hearing and upon arraignment entered his plea of "not guilty" to each count.

The case originally was assigned by lot to Chief Judge William H. Becker, who on July 23, 1973, with the consent of Judge Richard M. Duncan, transferred the case to Judge Duncan for all purposes.

A large amount of pretrial discovery was accomplished by defendant's counsel, who, among others, filed the following pretrial motions on the dates indicated:

(1) Motion to Suppress a tape recording of a conversation by defendant with two other persons (March 7, 1973);

(2) Motion to Dismiss (April 26, 1973);

(3) Motion for Discovery and Inspection (April 26, 1973);

(4) Motion for a Bill of Particulars (April 26, 1973);

(5) Motion for Disclosure (June 3, 1974);

After appropriate presentation of all of these motions to Judge Duncan, on May 31, 1974 he overruled the motion to dismiss, specifically holding that the indictment did validly charge federal offenses, but noting that Counts I and II might be duplicitous. He reserved the question of duplicity until trial. At the trial he caused the Government to submit the case on Count II only. On June 6, 1974,

he overruled defendant's Motion to Suppress. On that date he also overruled defendant's Motion for a Bill of Particulars upon being advised that all of the requested items had been provided by the Government. On June 6, 1974, he sustained defendant's Motion for Production of Grand Jury Transcripts. On June 12, 1974, he sustained in part and overruled in part defendant's Motion for Disclosure. A careful reading of the transcript convinces that Judge Duncan correctly ruled each of these motions after they had been fully presented to him on the merits.

After all previously filed motions had been disposed of, on June 19, 1974 Judge Duncan set the case for jury trial to commence on Wednesday, July 10, 1974. The trial was held as set. It lasted three days and on July 12, 1974 resulted in an unanimous jury verdict of guilty on Count II, the only count Judge Duncan submitted. Judge Duncan accepted the jury verdict as duly returned.

Current Motions

At the conclusion of all the evidence in the case, and before Judge Duncan submitted the case to the jury, defendant's counsel renewed an earlier filed Motion For Judgment of Acquittal. Judge Duncan reserved his ruling on this motion.

On September 9, 1974, and within the time allowed by Judge Duncan, defendant's counsel filed a Motion For a New Trial. The above mentioned two motions were undisposed of at the time of Jude Duncan's untimely death on July 31, 1974.

Thereafter, by action of the Court en Banc the case was assigned to the undersigned Judge for disposition of the motions and for any and all other appropriate action.

Successor Judge Question

At the outset a determination had to be made as to whether the undersigned judge could properly take over the case at the point of Judge Duncan's death and process it to completion, including the ruling of all outstanding motions. This matter has been dealt with in the undersigned judge's separate certification to that effect. Rule 25, Federal Rules of Criminal Procedure. There is no need for further discussion of it in this opinion other than to note that case law requirements applicable to that rule indicate that the successor judge must exercise a sound judicial discretion to determine if in the light of the posture of the case at the time of death and the applicable law the successor judge can satisfactorily, fairly, and with justice to all of the parties perform the duties of the judge who presided at the trial. This discretion the successor judge has so exercised and has determined that he should and can serve as successor judge. See Connally v. United States, 249 F. 2d 576 (8th Cir. 1957) and United States v. Carbo, 314 F. 2d 718, 749 (9th Cir. 1957).

This is not a complicated case. As stated by defendant's counsel in his memorandum in support of his Motion For a New Trial, "It soon developed that the Government's case was based solely on the tape—a comparison of what was said on the tape and before the Grand Jury." Thus, the principal evidence in the case is embodied in two items in evidence: (1) the Grand Jury Transcript of defendant's under oath answers to Government counsel's questions, and (2) the tape containing defendant's conversation with Charles J. Davis and George Overton. The case is remarkably free of any need to weigh credibility

matters.[1] And as earlier noted, only two motions remained unruled at the time of Judge Duncan's death— (1) A reserved Motion For a Directed Verdict of Acquittal, and (2) A Motion For a New Trial. The record of the case is such that any judge, upon becoming familiar with it, could resolve the remaining matters in the case.

Disposition of Motion For Judgment of Acquittal

The question of the proper disposition of the Motion For Judgment of Acquittal is easily answered in the light of the transcript and the applicable law.

Rule 29, Federal Rules of Criminal Procedure, provides for the taking of a motion for a judgment of acquittal made at the close of the case under advisement as Judge Duncan did. The legal test for ruling such a reserved motion is set out as follows: "If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. * * *

1. There is no reasonable doubt that the conversation was taped, that it was defendant's voice that spoke, and that the tape was an accurate recording. Defendant took the stand and acknowledged his voice and the event. Overton testified he was present at the conversation, and that the tape accurately recorded it. Defendant was asked about those portions of it upon which the Government indicted him in Count II and acknowledged its accuracy. Example (Transcript, page 405) "Q. * * * (from the tape) I can, I can control Frank". "Now will you please tell the jury what was meant by that statement? A. *I made that statement*, and it was that I could go and talk to Mr. Grayson . . . ." And on cross-examination on this same subject (Transcript, page 427) "Q. So that part of the tape is completely accurate, isn't it? A. *Yes*, that doesn't mean that you own him." (Emphasis added) The transcript from pages 436 through 447 are replete with such admissions as to the accuracy of the tape of the defendant's recorded conversations with Davis and Overton, including identifying his voice. There was no evidence of any inaccuracy in the transcript.

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full pay to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilty beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or not reasonable doubt, is fairly possible he must let the jury decide the matter." Curley v. United States, 160 F. 2d 229, 232-233 (D.C. Cir. 1947), cert. den. 331 U.S. 837; Conaway v. United States, 349 F. 2d 907, 910 (8 Cir. 1965), cert. den. 382 U.S. 976.

Thus, it is not for the judge ruling on a motion for a judgment of acquittal to assess the credibility of the witnesses, weigh the evidence, or draw inferences of fact from the evidence. These are functions of the jury. The trial court is limited to deciding whether a sufficient showing has been made to the jury on the basis of the view of the evidence and inferences therefrom favorable to the prosecution. See 2 Wright, Federal Practice and Procedure, § 467, pp. 259, 290. Moore v. United States, 375 F. 2d 877, 879-880 (8th Cir. 1967); and United States v. Fryer, 419 F. 2d 1346 (8th Cir. 1969), cert. den. 397 U.S. 1055.

The defendant was charged in each of the two counts of the indictment with making certain false material state-

ments on August 1, 1972, before a federal grand jury in violation of 18 U.S.C. § 1623. As earlier noted, the evidence relied on by the Government was a duly authenticated copy of the testimony of the defendant before the federal grand jury and a tape recording of a conversation between the defendant and two other individuals, Charles J. Davis and George Overton, with whom he was discussing a private business transaction. Defendant under oath denied to the federal grand jury that he had suggested or represented to any person that he had the power to influence a public official with respect to gambling and liquor violations and denied he had any conversation with any other person associated with the Shangri-la about furnishing protection from local authorities with respect to gambling or liquor violations. The taped conversation of the defendant and the two individuals discloses that the defendant prior to his grand jury appearance did discuss these two matters with them. There was ample evidence as to the authenticity and accuracy of the taped conversation. There was substantial evidence showing the chain of possession of the tape. The defendant while he was on the witness stand stated that he had made some of the crucial statements recorded on the tape. All of the elements of the offense charged in Count II of the indictment were supported by the two items; the federal grand jury transcript of the defendant's testimony before the grand jury, and the taped conversation between defendant and the two men. There was other evidence adduced at the trial of a corroborative nature, including the testimony of one of the men who participated in the taped conversation. Hence, the motion for a directed judgment of acquittal is without merit and is denied.

Motion For New Trial Contentions

In his Motion for New Trial defendant's counsel has raised twenty-one separate contentions as to why a new trial should be granted. The first ground that he so raises is that the evidence is insufficient to sustain a conviction for the offense charged in Count II of the indictment. It is unnecessary to give further treatment to that contention in this opinion. It has been fully covered in the discussion and disposition of the Motion For a Directed Verdict of Acquittal. Suffice it to say the evidence is sufficient to sustain the conviction.

Defendant's second charge of error in the Motion For a New Trial is that the court erred in failing to grant defendant's Motion For Judgment of Acquittal at the conclusion of the Government's case and at the close of all of the evidence. This contention has been earlier disposed of in this opinion.[1]

Defendant's fourth and fifth contentions need to be considered together. Basically they are that the questions and answers alleged in Count II of the indictments as violations of 18 U.S.C. § 1623 are immaterial in that they could not have impeded or persuaded the grand jury in its investigation, nor could they have had any effect thereon, and further that the grand jury lacked jurisdiction to return the indictment against the defendant in that the matters alleged and attempted to be proved with respect to Count II of the indictment related to events that could have occurred only in the Northern District of Oklahoma.

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1. Defendant's third charge of error will be discussed later.

The Question of Grand Jury Jurisdiction

The above raised question of the jurisdiction of the grand jury was also raised earlier upon numerous occasions by defendant's counsel before Judge Duncan, and Judge Duncan at numerous places in the transcript indicated that the contention was without merit. Basically, defendant's counsel's contention is that the matters alleged in the indictment and the questions and answers given by defendant before the grand jury related to matters occurring in the Northern District of Oklahoma only, and that therefore the grand jury was without jurisdiction over the subject matter and over the person of the defendant. However, the evidence in the case reveals that the grand jury was conducting an ongoing investigation into possible federal crimes being committed in the Western District of Missouri in a matter that involved both Kansas City, Missouri, and the Northern District of Oklahoma as a part of a conspiracy situation and of a continuing crime type situation.[1] Specifically, the investigation was of certain Kansas City, Missouri hoodlums who were allegedly setting up or engaging in illegal gambling and liquor operations in north Oklahoma. In so doing these persons were allegedly using interstate communication facilities, interstate highway facilities and were themselves engaging in interstate travel. The conspiracy being investigated included conspiratorial activities and overt acts in connection with and in furtherance of the alleged con-

1. A reading of the testimony before the grand jury of the thirty-one witnesses (all before Judge Duncan in camera) discloses that the ongoing grand jury investigation did include the possible conspiracy to commit and the substantive acts of committing the mentioned illegal gambling and liquor violations by certain Kansas City hoodlums and by persons in the Northern District of Oklahoma jointly and severally. These transcripts also disclosed that these matters involved the use of interstate travel, interstate transportation, and interstate communication.

spiracy, which activities and overt acts occurred, among other places, in Kansas City, Missouri.[1]

Judge Duncan received in evidence and viewed in camera the some thirty-one grand jury transcripts in connection with the described investigation of the federal grand jury and found that the grand jury did have jurisdiction in all respects. He further found that the questions asked of the defendant and the answers given which were the basis of the grand jury indictment were material to the ongoing investigation of the federal grand jury and that the untrue answers given tended to impede that investigation.

It is noteworthy that defendant's counsel stated at the October 19, 1973 hearing before Judge Duncan that he was not questioning the jurisdiction of this grand jury to investigate what it was investigating. (Transcript of the October 19, 1973 hearing, page 15.) Judge Duncan asked, "'Then the question about the grand jury having jurisdiction to investigate gambling under the Racketeering Act isn't any question about that?' Mr. Jenkins: (defendant's counsel) 'Oh, no, we don't object to that.'" (Transcript of October 19, 1973 hearing, page 22.)

It is clear from the transcripts that the federal grand jury's mentioned ongoing investigation was directly relative to the possible commission of federal crimes in the Western District of Missouri contrary to one or more of

1. Although perhaps immaterial to this opinion, on October 24, 1973, the Department of Justice by letter with a copy to defendant's counsel advised Judge Duncan that in connection with the investigation above described there had resulted an indictment titled United States v. James D. Duradi, Nathaniel J. Brancato, Clifford Lavern Bishop, Jack Michael King, George L. Husong and Lewis F. Greyson, returned October 23, 1972. These men were later tried in Judge Oliver's court with convictions resulting. See hearing transcript, October 19, 1973, pages 31-32.

the following statutes: 18 U.S.C. § 1952 (Racketeering Enterprises); 18 U.S.C. § 1955 (Illegal Gambling Business); 18 U.S.C. § 1511 (Obstruction of State or Local Law Enforcement); 18 U.S.C. § 892 (Extortionate Credit); 18 U.S.C. § 893 (Extortionate Credit); and 18 U.S.C. § 894 (Credit).

Judge Duncan correctly ruled the federal jurisdiction question including the question of jurisdiction over both the person and the subject matter. He correctly overruled defendant's counsel's Motion to Dismiss the Indictment on the basis of lack of jurisdiction.

Additional Questions Concerning the Grand Jury's Judiction and the Materiality of Defendant's Answers

Defendant's counsel's contentions of error, Nos. 7, 8 and 9 of the Motion For New Trial likewise need to be grouped for the purpose of discussion and disposition. Basically they are: (1) that the grand jury lacked jurisdiction of the defendant since he was brought before it solely for the purpose of attempting to entice him into making inconsistent and possibly false statements and not to obtain information in order to aid and assist its investigation; (2) that the prosecution was defective in that it was based on and arose out of entrapment, and (3) that it was an abuse of the grand jury process for the Government prosecutors to utilize repetitive questions to coax compromising or inconsistent answers from the defendant.

The grand jury was carrying out an investigation of the possible commission of federal crimes in the Western District of Missouri. A review of the grand jury testimony of the defendant, and likewise a review of the grand jury transcripts of the other witnesses called before the grand jury (all of which material was before Judge Duncan) shows that the grand jury did have a proper purpose

in calling the defendant before it for the purpose of endeavoring to secure information from him relevant to its ongoing investigation.

The defendant is an experienced practicing attorney-at-law who at an earlier time had served in the office of the prosecuting attorney. A reading of the transcript of his grand jury testimony shows that there was no attempt made by anyone to overreach him, or to induce him to make false statements. There is no evidence that he was entrapped into telling any falsehood or into lying under oath. If indeed a mature, experienced, practicing attorney can ever be entrapped by grand jury counsel into intentionally lying under oath to a federal grand jury there certainly is no evidence of any such event in this case. Government counsel carefully explained to the defendant several times prior to and during the questioning just what it was the grand jury was inquiring into. Government counsel indicated to the defendant that there might be some reason to believe he may have played some part in some of these alleged illegal activities under investigation. In the face of all of that, the defendant elected to proceed to answer the questions, and nothing occurred that could be said to be either entrapment or an inducement to make him tell an untruth under oath.

The Questions Concerning the Tapes

In contentions No. 10, 11, 17, 18 and portions of 21 defendant's counsel takes the position: (1) that the tape was obtained in an illegal manner; (2) that the tape was too unclear and unintelligible to be used; (3) that it contained some 36 errors and gaps; and (4) that there was no proper foundation laid by way of showing its prior custody to permit it to be used. All of these contentions made in the motion for new trial had likewise been unsuc-

cessfully urged by defendant's counsel upon Judge Duncan in the various pretrial and trial motions. Judge Duncan found that they were not meritorious.

According to the evidence, Charles J. Davis was a Kansas City and Oklahoma businessman who owned, operated and was in the process of developing a resort lodge, including a "club" and a condominium complex known as the Shangri-la Estates and Shangri-la Lodge, located in the vicinity of Afton, Oklahoma. Through contacts with a third party Davis became aware that defendant would be interested in representing Davis on certain matters involving Davis's resort lodge and condominium complex for the sum of $10,000. A meeting was eventually arranged to discuss these matters, with the defendant, Davis, and an employee of Davis, George Overton, to be present. Davis, with Overton's knowledge and assistance, employed J. R. Gates, a Wichita, Kansas, private detective to secretely record the conference. The conference, unknown to defendant, was recorded by Gates. The tape recording of the conference was turned over to Davis who many months later after the federal government learned of its existence turned it over to a Government official who in turn turned it over to the federal grand jury. It is this tape that the Government relied on at the trial to show that the defendant perjured himself before the grand jury as charged in each of the two counts of the indictment.

The defendant in a pretrial motion moved for the suppression of this tape and Judge Duncan, after hearing, overruled and denied the motion to suppress. On numerous additional occasions defendant's counsel orally renewed his Motion to Suppress. Each such motion was overruled and denied by Judge Duncan, who, again over objection, and after a full showing of the chain of custody of the

tape permitted it to be used in evidence at the trial. Further, George Overton, who was present during the taped conversation, testified at the trial that the tape was an accurate recording of that conversation.

There is no evidence that the Government or any of its employees or agents caused, assisted, or in any way participated in the taping. The taped meeting was of a conversation of private persons, and the taping was made by a private person at the request of and with the knowledge and consent of two of the three persons who attended the taped meeting. It was some months later before any Government agent or employee learned of the existence of the tape.

18 U.S.C. § 2511(2) (d) specifically provides that, "It shall not be unlawful under this chapter for a person not acting under the color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act." Since the taping was at the instance of and with the consent of two of the three persons taped in their three way conversation it meets the exemption above stated. There is no evidence to indicate that the communication was intercepted by the private detective employee for any reason other than the desire of the two consenting persons to have a taped recording of their business contact and conversation with defendant to protect their credibility as to any employment reached and as to the terms of that employment. These two individuals were under no duty of silence as to their conversation

with defendant. Nor is there any evidence to support a finding that the intercepted communications were for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any injurious act. See Meredith v. Gavin, 446 F. 2d 794 (C.A. 8). Defendant's memorandum of law in support of his motion to suppress (denied by Judge Duncan) concedes Oklahoma statutory law is directed only to preventing invasion of privacy by using one's name or picture for commercial purposes without the owner's consent. Even without that there simply is no evidence to support defendant's contentions of illegality in obtaining the tape. Judge Duncan did not err in denying the Motion to Suppress and there is no proper ground for granting a new trial based on defendant's contention.

Section 1623, Title 18, United States Code, proscribes the making knowingly under oath to a federal grand jury of ". . . any false material declarations . . . ." Defendant's counsel seeks to escape this proscription for the reason that the questions and answers alleged in Count II were too vague, ambiguous, repetitious, argumentative, equivocal and unresponsive to sustain a conviction. The short answer is that the basic questions asked were clear and understandable. The answers given by defendant reflected his understanding of the particular question and those answers were relatively clear and unequivocal. Defendant's counsel in his brief in support of this contention has selected background type statements and some immaterial matter and has chosen not to recognize the basic questions and the defendant's responsive answers thereto. These basic questions were sufficiently precise, and the answers given by defendant were clear and were material declarations directly responsive to the questions.

Further, there is no support for the claim that the tape was of such poor quality that it was unusable and that it had thirty-six errors and gaps in it. A listening to the tape reveals that it is a good, clear, understandable recording of the event. There is no evidence that it is other than an accurate recording of the conversation it purports to record. Witness George Overton who was present at that conversation testified at the trial that it was an accurate recording of the conversation. The defendant who took the stand and was asked about certain portions of the tape himself conceded that the things read to him from the tape were accurate and that they did occur. He simply endeavored to mitigate or to explain statements that he had made and that were recorded on the tape by endeavoring to give his explanation of what he intended or meant. He did not deny that they were accurately recorded.

In his contention No. 20 defendant's counsel claims that the Court erred in failing to inform counsel during the instruction conference or at any other time that he was going to instruct the jury that Davis and Overton had a legal right to take the secret tape, thus misleading counsel for the defendant and completely hampering his ability to effectively argue his case to the jury. As earlier noted, from the inception of this case defendant's counsel objected to the tape and sought to suppress its admissibility and use by the Government. In each of these numerous earlier instances Judge Duncan took the position that the tape was validly obtained and it was usable as evidence by the Government. His rulings are all in the record. As an example, at Trial Transcript page 359 Judge Duncan stated: ". . . my opinion is that the so-called recording of it is legal, within the law . . . ." And see pages 244-250 and page 3 of the same

transcript. But in spite of all of this, defendant's counsel improperly undertook to argue to the jury the invalidity of the tape as evidence. Judge Duncan properly told the jury that the tape was legal evidence. He did not err in so doing.

The Tape Transcript Question

Additionally, defendant's counsel complains in the motion for a new trial that the jury was given a typewritten transcript of the taped conversation without adequate evidence of its correctness. However, without objection, Judge Duncan allowed the jury to have the transcript solely and for the limited purpose of being able to distinguish who was speaking at a particular time. Defendant's counsel voiced no opposition to this limited use of the transcript at the trial. Judge Duncan carefully instructed the jury several times that the transcript itself was not evidence; that the jury would have the tape recording played and that the tape was the evidence rather than the transcript, and that they were being allowed to have the transcript for the sole and only purpose of being able to note who was speaking at a given time. And eventually, because it was clear that the transcript was no longer needed for voice identification, and again without any objection, the tape was played to the jury without the aid of the transcript.

It comes too late for defendant's counsel now for the first time to object to the limited use of the transcript which Judge Duncan so carefully handled. The jury fully understood from the clear instructions given by Judge Duncan that they must look only to the tape recording itself for what was said and not look to the transcript for that purpose. The evidence given by defendant himself at the trial was sufficient to permit voice identification,[1] and there was no claim that the jury was misled in any way by permitting the limited use of the transcript for voice identification purposes only.[2]

Reopening of Trial Question

Defendant's counsel in his contention No. 15 declares that the Court erred in permitting the Government after it had rested to reopen its case in order to receive *for Court use only* the grand jury transcripts that showed the testimony of the various witnesses the grand jury had before it, all to the end to show the materiality of the matters alleged in Count II of the indictment. The fact is, that near the close of the trial, counsel and Judge Duncan engaged in a colloquy concerning evidence. At no time did Government counsel announce that the Government rested. The Government did not formally close its case. Even so, the circumstances may have caused some belief by defense counsel that the Government had adduced all of its evidence. A discussion concerning whether there was sufficient evidence concerning materiality occurred. Government counsel, obviously under the impression that having introduced at the earlier hearing on the Motion to Suppress the Tapes, the mentioned grand jury transcripts of its investigation for Court use only, thought they were in evidence for trial purposes also. As a result, Judge Duncan at the end of the jury evidence in the exercise of his discretion permitted the introduction of these tapes into evidence for Court use only. Regardless of whether it is viewed that these tapes were introduced in evidence before the Government had formally rested or immediately

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1. He identified his voice on the tape.

2. In fact, defendant's counsel seemed to go along with Judge Duncan's handling of the tape transcript and to agree with it. See, Trial Transcript, pages 189-195; 267-269; 539-543.

thereafter, there was no error committed by Judge Duncan in the sound exercise of his discretion to then receive them into evidence for Court use only. Nothing further was introduced that went to the jury or that was called to the attention of the jury. The question of the materiality of defendant's statements to the grand jury was solely one of law for the Court. Not only did no legal error result from Judge Duncan's actions but no actual prejudice is shown to have resulted because of the timing of the event of their receipt into evidence for Court use only.

Jury Separation Question

Defendant's next contention, No. 19, is that the Court erred in permitting the jury to separate for a period of about an hour after they had commenced deliberations. The transcript reveals that at the time in question and due to the lateness of the hour, some of the jurors expressed in open court, with all counsel and defendant present, their concern about their automobiles, which presumably were parked in various parking lots. Judge Duncan permitted those jurors who had such a problem to go and, as he expressed it, get their cars "out of hock" and to have a brief meal, advising them they should be back in three quarters of an hour. During this discussion defendant's counsel stood by and made no objection and requested no instructions. After Judge Duncan had permitted the jury to depart for the mentioned purpose, defendant's counsel objected to permitting the jury to separate. There is total absence of any showing of any prejudice or of any irregularity having occurred at any time while the jury was so separated. There was no request for a discharge of the jury. In earlier instructions to the jury, Judge Duncan had made it clear to them that they were to decide the

case solely on the evidence in the case. He gave them the customary instructions concerning their jury conduct.

Under all the circumstances, defendant's counsel's objection came too late. Additionally, the action that Judge Duncan permitted is not shown to have caused or occasioned any prejudice to defendant whatsoever. Hence, the contention is without merit. It is correctly stated in the case of Hines v. United States, 365 F. 2d 649, that this circuit has taken the position and held that it is not error per se to permit a jury to separate for a meal before deliberations are completed.[1]

Defendant's counsel next alleges that prejudicial error was committed by the prosecutor which could not be cured by the objections (which objections were promptly sustained by Judge Duncan in the presence of the jury) when the prosecutor told the jury in closing argument that the defendant could have moved for immunity for the detective-witness, J. R. Gates, who set up the taping and who refused to answer questions based on his fifth amendment rights.[1] However, during the trial and before the incident, defendant's counsel had represented to Judge Duncan, out of the hearing of the jury, that no claim would be made that defendant's case was prejudiced by this witness's invocation of his fifth amendment rights (See Trial Transcript, page 358). This was at a time the witness could have been immunized. Contrary to that representation defendant's counsel did so argue to the jury. (See Trial Transcript, page 485.) In reply to that argument Government's counsel stated only that the Govern-

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1. See Koolish v. United States, 8 C.C.A., 340 F. 2d 513, 528.

1. Defendant's counsel called J. R. Gates as a witness on behalf of defendant. There is no showing that his testimony would have been helpful to defendant.

ment "didn't attempt to hide the testimony of that man, Gates" and suggested that defendant's counsel did not take up the Government's offer to assist in obtaining the testimony of witness Gates. (See Trial Transcript, pages 496-497, and 367.) It was at this point that defense counsel, not Government counsel, told the jury "he is arguing immunity to the jury, we didn't take immunity for the witness." (See Trial Transcript, p. 497.) Even so, Judge Duncan promptly and in the jury's presence sustained the objection of defendant's counsel. And Judge Duncan told the jury "I think it is not proper argument." Defendant's counsel was apparently satisfied. He asked no further action or instruction. He did not ask that the jury be discharged. Under all the circumstances, no reversible error, if indeed it was error at all, occurred. No timely requested relief was denied.

Conclusion

The above discussed contentions of the defendant are all that he endeavored to support in his brief. A few other comments by defendant's counsel might possibly be considered as charges of error. However, these have been carefully considered by the Court and not only are they not supported either by the transcript or by defendant's counsel's brief, but also they are totally void of any merit and do not require discussion. They are comparatively insignificant events.

The defendant has received a fair trial. The evidence of his guilt is very strong. That evidence is contained essentially in two instruments: (1) the grand jury transcript, and (2) the tape recording. Obviously, the usual issues of credibility involved in a trial are lacking in this one for the reason that the Government's evidence necessary to support its conviction is contained in these two instruments and does not involve the usual credibility

type considerations.[1] It is not in the interest of justice to permit a new trial in the absence of reversible or prejudicial error simply because of the unfortunate death of the trial judge before the two after-trial motions were ruled.

For all the foregoing reasons, the defendant's mentioned trial and post-trial motions are held to be without merit and are denied.

/s/ Elmo B. Hunter
Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1975

No. 75-1413

The United States,
Appellee,
vs.
William Fred Phillips,
Appellant.

Appeal from the United States District Court for the
the Western District of Missouri

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 26, 1976

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1. Judge Duncan said, "But this defendant's alleged intentional false statements to the grand jury is something only the witness himself has stated, that he testified before the grand jury, there is the cold facts. Here are the tapes. Now, if there is a conflict and the testimony and tapes are different, that isn't a question of two men out swearing each other, that's the man's (defendant) own statements, both of them." (Trial Transcript, page 307.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1975

No. 75-1413

The United States,
Appellee,

vs.

William Fred Phillips,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 6, 1976

APPENDIX B

STATUTES INVOLVED

18 U.S.C. Sec. 1623:

"1623. *False declarations before grand jury or court.*—(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. Sec. 2510(2): "*Definitions.*—

"* * * (2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation; * * *"

18 U.S.C. Sec. 2510(4):

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

18 U.S.C. Sec. 2510(5):

"(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—
* * *"

18 U.S.C. Sec. 2510(11):

"(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. * * *"

18 U.S.C. Sec. 2511(1): *"Interception and disclosure of wire or oral communications prohibited.—*

"(1) Except as otherwise specifically provided in this chapter [18 USCS §§ 2510-2520] any person who—* * *"

18 U.S.C. Sec. 2511(a):

"(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

"(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—* * *

"(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or * * *

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having

reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. Sec. 2511(2)(d):

"* * * (d) It shall not be unlawful under this chapter [18 USCS §§ 2510-2520] for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

18 U.S.C. Sec. 2515:

"Prohibition of use as evidence of intercepted wire or oral communications.—Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. Sec. 3504:

"Litigation concerning sources of evidence.—

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act; • • •"

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 73 CR 38 W-3

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM FRED PHILLIPS,
Defendant.

INDICTMENT

The Grand Jury Charges That:

• • •

COUNT II

On or about August 1, 1972, there was pending before a Grand Jury of the United States in the Western District of Missouri a proceeding, that is, an investigation of possible violations of federal law in connection with illegal gambling, prostitution and bribery and extortion activities in the Northeast Oklahoma and Kansas City areas.

Further, that on or about August 1, 1972, at Kansas City in the Western District of Missouri the defendant William Fred Phillips, being under oath in said proceeding, did willfully and knowingly make a false material declaration in that in response to questions by Government counsel he testified as follows:

• • •

Q. Okay. So you understand the people we are talking about in Kansas City that we have reason to

think moved in or attempted to move into the northeastern Oklahoma area, we have reports that they were attempting to set up gambling and prostitution and liquor businesses all in opposition to local law. We have also received other allegations that you may have counseled people that they could get away with gambling operations because you could control the local district attorney.

A. Okay, I understand.

Q. You understand what I am talking about?

A. I understand, of course.

Q. So the broad question is, since you have been senator, have you discussed with anyone associated with club operations in that area the possibility of their setting up and getting away with setting up gambling in that area?

A. No. No. And I wouldn't even insult the district attorney by talking to him about it. (Transcript page 47, line 18 to line 11 page 48)

• • •

Q. You have already told me you never talked to Grayson about that. I want to ask you the other question though: Have you ever talked to anyone else about your ability to control Mr. Grayson along these lines?

A. I told them there was no way of putting a fix on Frank Grayson. (Transcript page 47, line 18 to line 22, page 48)

• • •

Q. Now, as you have seen today, I have been in and out of the room, unfortunately. I don't know if my associate here has covered all of these areas

and I just hope you will excuse me if I am repetitious, but I would like to ask you a summary question, whether or not you have ever suggested, represented or any words to that effect to any person that you had the power to influence any public official with respect to gambling or prostitution activities?

A. No. No. Absolutely not.

Q. Now, we have reason to believe that certain Kansas City hoodlum figures, persons associated with the criminal element in the Kansas City area, are attempting or have attempted to establish gambling, prostitution, illegal liquor and other illegal activities in Oklahoma. We know and have documented that certain of these Kansas City hoodlums have visited Oklahoma and that they visited and talked with and perhaps had business dealings with a number of the club operators down there, which would include Jess Roberts, Jack King, people at the Shangri-la, possibly others. We are interested and are very eager to determine whether or not these persons may have talked with the local operators down there about how they could secure protection when they moved their illegal activities in or when they began engaging in illegal activities.

A. I—

Q. Consequently it's very important for us to know if you have ever had discussions with anyone, particularly persons who are associated with private clubs of any kind, and I mean private clubs or country clubs or the Shangri-la or any activity of that sort, in which you have represented that you had the power to influence the action of public officials with respect to prostitution, narcotics—excuse me, I didn't mean to say narcotics—

A. Well, I want you to put narcotics in there.

Q. All right, whether or not you have ever indicated to any person associated with any private club operation of any nature, including country clubs or the Shangri-la or any others, that you had the power to influence any public official with respect to prostitution, narcotics, liquor or gambling activities?

A. No, sir. I have never ever just carte blanche. . . . (Transcript page 77, line 24 to line 15, page 79)

• • •

Q. Okay. Have you ever had any conversation with either the—well, with any person associated with the Shangri-la either at your initiative or their initiative about the furnishing of protection from local authorities with respect to the same four items, gambling, prostitution, liquor or narcotics?

A. No. No. . . . (Transcript page 87, line 4 to line 10)

• • •

Q. Right. To rephrase the question, the conversations which you had with any representatives of the Shangri-la were never to the effect that you could furnish any protection from law enforcement authorities?

A. No. No. (Transcript page 88, line 23 to line 2, page 89)

• • •

And such testimony was false and contrary to the oath taken by William Fred Phillips as he then well knew and believed that he had represented to persons associated with club operations in the northeastern Oklahoma area, that he had control over Frank Grayson, District Attorney, 13th Judicial District, State of Oklahoma and could furnish protection from law enforcement authorities for illegal gambling and liquor violations.

All in violation of Section 1623, Title 18, United States Code.

A True Bill.

/s/ Walter L. Wristen
Foreman of the Grand Jury

/s/ Bert C. Hurn
Bert C. Hurn
United States Attorney
Western District of Missouri

/s/ Joseph F. Ciolino (by M.D.)
Joseph F. Ciolino
Special Attorney
United States Department of Justice

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-434

WILLIAM FRED PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 540 F. 2d 319. The opinion of the district court (Pet. App. A22-A43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1976. A petition for rehearing was denied on July 26, 1976 (Pet. App. A43). Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 24, 1976, and the petition was filed on September 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant has the burden of proving that a private consensual interception of a conversation

was made for an improper purpose in violation of 18 U.S.C. 2511(2)(d) and was therefore inadmissible under 18 U.S.C. 2515.

2. Whether petitioner's grand jury testimony was perjurious in violation of 18 U.S.C. 1623.

3. Whether petitioner's false testimony was material to the grand jury's investigation.

STATUTES INVOLVED

18 U.S.C. 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

18 U.S.C. 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court * * * of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2518(10)(a)(i) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department,

> officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted.

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of making a false statement before a grand jury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to imprisonment for one year. The court of appeals vacated petitioner's conviction and remanded the case for a hearing on petitioner's pre-trial motion to suppress certain electronic interception evidence (Pet. App. A4-A10). The court rejected petitioner's remaining contentions (Pet. App. A11-A22).

The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. A1-A4) and may be summarized as follows: Petitioner, an Oklahoma state senator and practicing attorney, was retained by Charles Davis, the owner of the Shangri La Lodge, a resort located in northeastern Oklahoma, to obtain approval from the Grand River Dam Authority for certain improvements to the resort's lakeshore property. On July 7, 1971, petitioner met with Davis and resort manager George Overton to discuss the legal services he would provide the Lodge and the fee he would receive. Davis tape-recorded the conversation without petitioner's knowledge. During the meeting petitioner told Davis and Overton that they could safely operate illegal gambling and liquor sales activities at Shangri La. At one point petitioner stated, "I can, I can control Frank," in apparent reference to his ability

to prevent local district attorney Frank Grayson from prosecuting the Lodge and its management for state liquor and gambling law violations.

On August 1, 1972, petitioner was called to testify before a grand jury in Kansas City, Missouri, investigating a conspiracy between Kansas City organized crime figures and northeastern Oklahoma nightclub owners to establish illicit liquor, gambling and prostitution activities at Oklahoma clubs through the corruption of local law enforcement officials, in violation, *inter alia*, of 18 U.S.C. 1511, 1951, 1952 and 1955. Petitioner repeatedly denied before the grand jury that he had ever represented to anyone that he could exert influence over any state or local law enforcement officials to protect the Shangri La Lodge and its management from prosecution for gambling, prostitution, liquor or narcotics law violations. Before calling petitioner to testify, the grand jury had heard district attorney Frank Grayson's testimony that Charles Davis had told him of petitioner's claim that he could furnish Davis protection from local law enforcement authorities.

At his trial for perjury, petitioner sought to have the tape of his conversation with Davis and Overton suppressed on the ground that the recording was made for the purpose of committing a tortious act, in violation of 18 U.S.C. 2511(2)(d). Petitioner's motion to suppress was denied without a hearing, and the tape was admitted as direct evidence of the falsity of petitioner's denials before the grand jury. The court of appeals found that petitioner had not been accorded an adequate opportunity to show that the recording was made for an improper purpose, which would require suppression under 18 U.S.C. 2511 (2)(d) and 2515. The court therefore remanded the case to the district court for a hearing on that issue at which petitioner would bear the burden of showing that the conversation was recorded for one of the purposes proscribed

by 18 U.S.C. 2511(2)(d). Those proceedings have not yet been held. Petitioner raised several other contentions on appeal that were unrelated to the admissibility of the tape. Those claims were fully reviewed, and rejected, by the court of appeals.

ARGUMENT

1. Petitioner's main contention is that the government has the burden of showing that a consensual tape-recording *was not* made for one of the purposes proscribed by 18 U.S.C. 2511(2)(d) and accordingly that the court of appeals in its remand order erroneously placed on him the burden of showing that the tape *was* made for an improper purpose.

In view of the remand by the court of appeals, resolution of petitioner's contention at this juncture is premature. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251. Even assuming that the court of appeals erroneously allocated the burden of proof in its remand order, petitioner may still prevail on his motion to suppress at the hearing on remand, in which case the issue he raises will be moot.[1] On the other hand, should petitioner lose at the forthcoming hearing and his conviction be reinstated by the district court, he will be able to appeal from that determination and to petition this Court for review of this contention at that time.

In any event, the court of appeals' allocation of the burden of proof for the hearing on remand was proper. As it correctly concluded (Pet. App. A7): "Available legislative history in regard to §§2511(2)(d) and 2515

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[1]The court of appeals held that petitioner must be granted a new trial if the tape is suppressed (Pet. App. A10).

reflects no congressional desire to change the traditional burden of proof with respect to suppression of electronically gathered evidence." It has long been settled that "[t]he burden is * * * on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed." *Nardone* v. *United States*, 308 U.S. 338, 341.[2]

There is no reason to shift the burden from its customary resting place when suppression is sought under Section 2511(2)(d). The government does not have superior access to the proof necessary to show the purpose for which a private consensual interception was made. Indeed, interceptions covered by 2511(2)(d) are, by definition, made without the participation of the government. The government is consequently in no position to explain the reason for the interception. Rather, the parties to an intercepted conversation are the persons most likely to know why the interception was made. It is thus entirely appropriate to place the burden of showing the purpose of a private interception on the person seeking suppression. As a participant in the intercepted conversation, that person is familiar with the context in which the conversation occurred and is accordingly likely

[2]Petitioner's reliance on *Whiteley* v. *Warden*, 401 U.S. 560, for the proposition that the court of appeals should have reversed rather than remanded his conviction is misplaced. In *Whiteley* this Court held that the record did not establish that a magistrate had sufficient information to issue a warrant. In view of the fact that the defendant had challenged the sufficiency of the warrant at every stage of the proceeding and the State was satisifed to rely on the record, this Court declined to remand and give the State further opportunity to adduce new evidence regarding the information available to the magistrate. Here, petitioner's objection to the tape was made on the eve of trial, and the present record does not support his objection. The court of appeals has merely afforded petitioner an opportunity to carry his burden of proof with respect to that objection.

to have knowledge of the facts and circumstances necessary for the statutory showing.[3]

2. Petitioner's contention (Pet. 27-28) that his responses to the prosecutor's questions were not perjurious under this Court's decision in *Bronston* v. *United States*, 409 U.S. 352, is without merit. Unlike the situation in *Bronston*, petitioner did not offer evasive responses that were literally true although misleading by negative implication. Here the prosecutor repeatedly asked petitioner whether he had ever represented to anyone that he could use his influence to protect illicit gambling and liquor activities in northeastern Oklahoma from local law enforcement authorities. Petitioner responded unequivocally that he had not (see Pet. App. A49-A52). Petitioner's answers were both directly responsive and literally false and therefore properly punishable under 18 U.S.C. 1623.

[3]In a related claim, petitioner argues (Pet. 18-19) that the question whether the recording was made for one of the purposes proscribed by Section 2511(2)(d) should be determined by a jury. That question concerns the admissibility of the tape, and is thus for the court to decide. Rule 104, Fed. R. Evid. See *United States* v. *Whitaker*, 372 F. Supp. 154, 161 (M.D. Pa.), affirmed, 502 F. 2d 1400 (C.A. 3), certiorari denied, 419 U.S. 1113; *Steele* v. *United States*, 267 U.S. 505, 511.

Petitioner also urges that the making of the tape without his consent constituted a "tortious" invasion of his right of privacy and that the tape was therefore made "for the purpose of committing * * * [a] tortious act" within the meaning of 18 U.S.C. 2511(2)(d). As the court of appeals noted (Pet. App. A10 n. 5), that construction would make unlawful any interception by a private party of any conversation unless all of the participants to the conversation consented to the interception—a result plainly at odds with the statute's language permitting such interceptions "where *one* of the parties to the communication has given prior consent" (emphasis added). Clearly, the portion of Section 2511(2)(d) that prohibits the making of consensual interceptions for specified improper purposes addresses the use to which the intercepting party plans to put the interception once it is made, rather than the making of the interception itself.

3. The record does not support petitioner's claim (Pet. 24-27) that his false testimony was not material to the grand jury's investigation. The grand jury was investigating a possible conspiracy between organized crime figures in Kansas City and nightclub owners to establish illicit gambling, liquor, and prostitution activities in northeastern Oklahoma. During the course of its inquiry, the grand jury received testimony from various witnesses concerning petitioner's representation that he could "control" district attorney Grayson, testimony that indicated petitioner might be the link between the conspiracy and the public officials whose corruption was necessary to the success of the scheme. Thus, as the court of appeals correctly observed (Pet. App. A14), "the grand jury had to know the truth about * * * Phillips' statements that he could control Grayson," and "[b]y testifying that he could not put a fix on Grayson, Phillips frustrated any further fruitful investigation into legitimate matters before the grand jury." Petitioner's false testimony was therefore "material" within the meaning of the perjury statute. See *United States* v. *Lasater*, 535 F. 2d 1041, 1047 (C.A. 8); *United States* v. *Saenz*, 511 F. 2d 766, 768 (C.A. 5).[4]

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[4]Petitioner also suggests (Pet. 24-27) that the grand jury did not have "jurisdiction" to ask the questions to which he responded falsely because those questions dealt solely with his activities in the Northern District of Oklahoma, rather than the Western District of Missouri, where the grand jury was sitting. But it is settled that a grand jury investigating a conspiracy may inquire into conduct of conspirators that may have occurred elsewhere. *Brown* v. *United States*, 245 F. 2d 549, 554 (C.A. 8). In any event, 18 U.S.C. 1623, unlike other statutes punishing false statements (*e.g.*, 18 U.S.C. 1001), does not require the government to prove "jurisdiction" as an element of the crime, and it is no defense to a perjury charge that the government had no authority to ask the questions to which false answers were given. *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, plurality slip op. 12; *Bryson* v. *United States*, 396 U.S. 64, 72.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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